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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 94

JOHN A ACREE, and A. O. BAILEY, and H. M. SEVERN, and J. D. RANDOLPH, and C. H. CONKLIN, and D. L. CRABTREE, for themselves individually, and for, and as members of, a class of other persons similarly situated,

Petitioners

versus

AIR LINE PILOTS ASSOCIATION, an unincorporated association, and EASTERN AIR LINES, INC., a corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. _____

In The

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OCTOBER TERM 1967

JOHN A. ACREE, And A. O. BAILEY, and H. M. SEVERN, and J. D. RANDOLPH, and C. H. CONKLIN, and D. L. CRABTREE, for themselves individually, and for, and as members of, a class of other persons similarly situated,
Petitioners

v.

AIR LINE PILOTS ASSOCIATION, an unincorporated association, and EASTERN AIR LINES, INC., a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners, John A. Acree, A. O. Bailey, H. M. Severn, J. D. Randolph, C. H. Conklin and D. L. Crabtree, who bring this action in behalf of themselves individually, and for other individuals who are similarly situated, pray that a Writ of Certiorari issue to review the judgment of the U. S. Court of Appeals for the Fifth Circuit entered February 13, 1968.

JUDGMENT AND OPINION BELOW

The opinion of the U. S. Fifth Circuit Court of Appeals in this proceeding is reproduced in Appendix A to this Petition;

and its judgment herein is reproduced in Appendix B hereto.

The opinion of the U. S. District Court Atlanta Division of the Northern District of Georgia, from which Appeal was taken to the U. S. Fifth Circuit Court of Appeals, is reproduced as Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered February 13, 1968. The jurisdiction of this Court is invoked under 28 U. S. Code Section 1254(1).

QUESTION PRESENTED

This is a suit asserting individual and personal rights by a number of individuals who were formerly employed by Respondent Eastern Air Lines as flight engineers in Eastern's cockpit flight crews. Respondent, Air Line Pilots Association (herein, ALPA) has historically been the statutory collective bargaining representative for the bargaining unit of Eastern's pilots. The Flight Engineers International Association (herein, FEIA) has historically been the statutory collective bargaining representative for the much smaller bargaining unit of Eastern's flight engineers; however, FEIA is not a party here and none of its institutional representational or jurisdictional rights under the Railway Labor Act are asserted here. Petitioners, here, assert their individual and personal rights and seek redress in damages from Respondent ALPA based upon the conduct of ALPA (as set forth in the Complaint, and as more particularly discussed herein in the Statement of the Case, infra) by which

ALPA coerced and compelled Eastern, through costly and ruinous featherbedding, to agree in effect to replace Eastern's traditional flight engineers, your Petitioners, with a number of ALPA's then unemployed pilot members -- all, in violation of ALPA's duty implied under the Railway Labor Act.

Since these said developments also imperiled FEIA's collective bargaining status, FEIA previously brought suit for injunctive relief against Eastern and ALPA for alleged violations of FEIA's representational or jurisdictional rights under the Railway Labor Act as representative for the bargaining unit of Eastern's flight engineers. But the District Court, prior to trial, denied a temporary injunction based upon its conclusion that it lacked jurisdiction over the subject matter since such representational and jurisdictional issues were within the exclusive jurisdiction of the National Mediation Board under the Railway Labor Act. And, the Second Circuit Court of Appeals affirmed that said ground for denial. 208 F. Supp. 182, 50 LRRM 2929 (S.D.N.Y., 1962), affirmed 311 F. 2d 745, 52 LRRM 2153 (CA 2, 1963).

Thereafter, FEIA amended its complaint in that District Court to seek: First, an order that Eastern bargain with FEIA as exclusive bargaining representative of Eastern's flight engineers; and Second, a declaratory judgment declaring that a number of related agreements between Eastern and ALPA were void, that FEIA have judgment for general and exemplary damages, and that Eastern reinstate its flight engineers. But, the District Court dismissed the complaint, prior to trial, on Defendants Motion for Summary Judgment on the ground that the

Court lacked jurisdiction over the subject matter since FEIA was asserting essentially a representational and jurisdictional claim that was within the exclusive jurisdiction of the National Mediation Board. 243 F Supp. 701, 59 LRRM 2865 (S.D.N.Y., 1965). The Second Circuit Court of Appeals affirmed the dismissal by the lower court expressly upon the ground of ". . . lack of jurisdiction over the subject matter . . . .", 359 F 2d 303, 62 LRRM 2374 (1966). (This Second Circuit Decision is found in Appendix D herein).

In this instant proceeding the District Court, prior to trial, dismissed this complaint upon the alleged grounds: First, that these individual personal claims by Eastern's former flight engineers, your Petitioners, involved a representational and jurisdictional dispute between FEIA, ALPA, and Eastern, which was within the exclusive jurisdiction of the National Mediation Board under the Railway Labor Act; and Second, that, even though these individual plaintiffs were not parties to the aforesaid litigation brought by FEIA and even though FEIA is not a party to this proceeding, these individual claims are barred under the doctrine of res judicata by the aforesaid Second Circuit Court of Appeals Decision (Appendix D herein) in the proceeding brought there by FEIA. (Appendix C herein) The U. S. Fifth Circuit Court of Appeals affirmed the District Court's dismissal and based its affirmance entirely upon this said second ground of res judicata. (Appendix A herein). Since your individual Petitioners were not parties to that said Second Circuit Proceeding, the Fifth Circuit apparently based its ruling upon the legal proposition that a general presumption of privity

exists between a Railway Labor Act union (here FEIA) and a bargaining unit employee (Petitioners), with respect to the individual and personal rights of the bargaining unit employee.

(a) Thus, the specific question presented to this Court is: Whether the Fifth Circuit Court of Appeals was correct in holding that the aforesaid Second Circuit Court of Appeals decision (Appendix D Herein) in the proceeding brought by FEIA bars the individual and personal claims by these individual flight engineers, your Petitioners, presented in this proceeding, based upon wrongs done by the Pilots Union, ALPA, to their individual and personal job rights, as Eastern's historical flight engineers.

(b) However, Petitioners also ask this Court to decide the underlying question raised by the Fifth Circuit's aforesaid general presumption of privity between a Railway Labor Act union and the individual bargaining unit employees; since Petitioners believe that this said legal presumption by the Fifth Circuit is erroneous (at least with respect to those individual and personal rights of bargaining unit employees that do not derive from a collective bargaining contract), and that it poses, as a precedent, the greatest peril to the security of individual bargaining unit employees in many varied situations under both the Railway Labor Act, and the National Labor Relations Act, as amended. This underlying basic question is as follows: Is there a general presumption of law that privity, within the concept of the doctrine of res judicata, exists between a Railway Labor Act union and the individual employees

within its respective bargaining unit, with respect to those individual and personal rights of the individual bargaining unit employees that do not derive from a collective bargaining contract?

STATUTE INVOLVED

Petitioners assert here their individual personal claims primarily against Respondent ALPA, and these individual and personal claims are based upon ALPA's breach of a duty implied from the Federal RAILWAY LABOR ACT (herein RLA), Chapter 8, Title 45, of the United States Code, as amended; which duty prohibited ALPA, as a powerful union representing practically all of the pilots in the commercial aviation industry, including Eastern's pilots, from (as alleged in the complaint) abusing its statutory powers and bargaining franchise through the hostile and discriminatory coercion of Eastern (by means of costly and ruinous featherbedding) to assign the historical work and duties of Eastern's traditional flight engineers, your individual Petitioners, to ALPA's then unemployed pilot members.

STATEMENT OF THE CASE

Since your individual Petitioners base their claims here entirely upon ALPA's breach of their individual and personal rights implied under the RLA (these said implied rights of Petitioners are more fully stated, infra, under the title, Reasons Review Should Be Granted), the United States District Court below had original federal question jurisdiction in this proceeding.

The allegations of the complaint, if proven, show essentially the following

facts and circumstances: At all material times Respondent Air Line Pilots Association (herein, ALPA), a Pilots' Union, has been the statutory collective bargaining representative for the bargaining unit of pilots in the employ of Respondent Eastern Air Lines (herein, Eastern), as well as for units of the pilots of most other domestic commercial airlines. ALPA has a virtual monopoly in the aviation industry over pilots and their interests, and thus ALPA is a major power in the industry. Prior to June, 1962, there had historically been a separate and much smaller collective bargaining unit consisting of the third cockpit crew member on Eastern's larger flights, who had historically performed the work and duties of flight engineer under a Federal Aviation Agency's (FAA) flight engineer certificate. The Flight Engineers International Association (herein, FEIA) had historically been the statutory collective bargaining representative for the bargaining unit of these Eastern Flight engineers.

The advent of the jet age around the time of the early 1960's fostered the prospect (and the fact to some extent) of a temporary but indefinite period of unemployment among some of ALPA's pilots at Eastern, as well as at other airlines in the Industry. This prospect of technological unemployment resulted from the fact that jet aircraft were much larger and much faster than conventional propellor driven aircraft. But, Eastern's flight engineers, as well as those of other commercial airlines, were not thus threatened with unemployment by the advent of the jets, since the jets, being larger aircraft, generally required the presence of an FAA certified flight engineer in the cockpit crew; whereas

many of the smaller conventional propellor driven aircraft did not require a flight engineer aboard.

ALPA's response to this problem was featherbedding in its purest and most costly form. Specifically ALPA compelled Eastern (as well as several other larger commercial airlines), by strike action and threats thereof, to carry a wholly useless third pilot aboard jet flights; with the result that the normal three-man cockpit crew of pilot, copilot, and certified flight engineer, historically used and preferred by Eastern (and most other airlines) and officially sanctioned by the FAA as being safe and efficient, was enlarged on such flights to a four-man crew.

ALPA's imposition of this third pilot upon Eastern and other airlines was done pursuant to a formal mandatory resolution passed at one of its conventions in anticipation of the advent of the jet age and its related interim employment problems for pilots. Which resolution, in effect, compelled the airlines to use only pilots, who were employed as pilots, in all cockpit crew positions; and even prohibited reference to the historical job title of "flight engineer" and specified that the historical job of flight engineer would be referred to as "Second Officer". This resolution has remained in force and effect at all material times (R-99).

An additional motivation for the adamacy in ALPA's insistence, that only pilots would be allowed to occupy the normal three crew member positions at Eastern, was the fact that at all material times a merger was proposed and pending between Eastern and another commercial airline. A clearly contemplated result

of this proposed merger was the merger of the pilot seniority lists of each airline into a single seniority list and a substantial reduction of the same.

That this said imposition of the useless third pilot aboard such flights was nothing but featherbedding is shown by the statements of position announced in respect thereto by spokesmen for the FAA, Eastern, and other major airlines and expert authorities (Appendix E).

Consequently, during the tenure of this third pilot in 1961 and up until June of 1962, and as a result thereof, Eastern experienced an operating loss running into the millions of dollars (R-161). As a result of this ruinous operating loss suffered by Eastern from this unnecessary third pilot cost, and for no other reason, Eastern announced in 1962 that it was reducing its four-man jet flight crews back to the usual three-man crews; but, that the flight engineers historical seat on such flights would thenceforth be occupied only by trained and qualified pilots; notwithstanding that, governing federal law required the presence of a certified flight engineer as the third crew member, but did not require the flight engineer to be pilot trained or qualified; neither did federal law require a third pilot aboard the aircraft.

At all material times during these said events ALPA's aforesaid mandatory resolution, that all cockpit positions be occupied only by trained and qualified pilots and employed as pilots has remained in force. Eastern's flight engineers (being under persuasive political pressures from presidential

mediating commissions and representatives to avert disruption of operations) expressly declared, albeit reluctantly, to ALPA and Eastern that the flight engineers would satisfy ALPA's ultimatum by becoming trained and qualified as pilots, though not required by the FAA or federal law to do so; if ALPA would but give written assurance that it would not enforce its aforesaid mandatory policy of having none but pilots in the employ of the company as pilots occupy the flight engineers seat. But, ALPA neither disavowed its said mandatory all pilot resolution, nor gave this requested written assurance that it would not compel Eastern to oust its historical flight engineers, your Petitioners.

Under these circumstances Eastern's flight engineers commenced a work stoppage in an effort to prevent Eastern's said capitulation to ALPA's said mandatory resolution and coercion; however, the flight engineers were soon replaced by ALPA's excess pilots (who had previously been given expedited and specialized flight engineer training by ALPA, and by Eastern at ALPA's compulsion); with the eventual result that ALPA was elected (with the votes of its relocated pilots) as the statutory collective bargaining representative for the bargaining unit of those crew members performing the historical duties of flight engineer on Eastern's large flights.

Subsequently, FEIA instituted its litigation in the U. S. District Court for the Southern District of New York and in the U. S. Court of Appeals for the Second Circuit, based upon FEIA's institutional representational rights under the RLA, which has been discussed

herein, supra, under the title, Question Presented.

In the instant proceeding Eastern's former individual flight engineers who were replaced by ALPA's pilots as discussed above seek redress from ALPA, based upon individual and personal rights implied under the RLA, for wrongs done to them individually by ALPA -- i.e. the aforesaid coerced reassignment by Eastern of all their historical work and duties to only trained and qualified pilots solely as a result of ALPA's aforesaid imposition upon Eastern of this said coercive and ruinous third pilot featherbedding. Your Petitioners do not seek to alter, amend, modify or rescind in any way the representational, or jurisdictional position of ALPA; nor to revive the prior representational interest of FEIA (indeed, the Eastern Airlines Chapter of FEIA has long since been defunct).

Nevertheless, the Fifth Circuit Court of Appeals concluded that the said prior decision by the Second Circuit (Appendix D), denying FEIA's claims on jurisdictional grounds, also barred these individual and personal claims based wholly upon ALPA's violations of your Petitioners' individual and personal rights implied under the RLA.

REASONS REVIEW SHOULD BE GRANTED

(1) RESJUDICATA DOES NOT BAR THIS ACTION BECAUSE: FIRST, PETITIONERS WERE NOT PARTIES, EITHER IN NAME OR IN PRIVITY, TO THE SUBJECT SECOND CIRCUIT PROCEEDING AND FEIA, THE PLAINTIFF LABOR ORGANIZATION THERE, IS NOT A PARTY HERE; AND SECOND, PETITIONERS' INDIVIDUAL AND PERSONAL CAUSES OF ACTION HERE, (WHICH ARISE BY IMPLICATION FROM THE RLA AS A RESULT OF ALPA'S COERCIVE AND HOSTILE DESTRUCTION OF PETITIONERS' INDIVIDUAL JOB RIGHTS) ARE WHOLLY DIFFERENT AND INDEPENDENT FROM THE INSTITUTIONAL, REPRESENTATIONAL RIGHTS OF FEIA THAT FEIA ASSERTED IN THE PRIOR SECOND CIRCUIT PROCEEDING:

The claim of Petitioners here is that their personal rights as individual employees of Eastern were violated by Eastern's coerced reassignment to only trained and qualified pilots of the historical work and duties of Petitioners, as Eastern's traditional FAA-Certified Flight Engineers, solely as a result of ALPA's compulsion exerted upon Eastern.

ALPA's said compulsion (which has been more particularly described in the statement of the case, supra) violated the duty owed to each of Petitioners personally under the Railway Labor Act (herein, RLA). This duty is implied by law from the RLA; and generally speaking it prohibits a union, such as ALPA, from abusing its powers and bargaining franchise, derived from the RLA, by engaging in hostile and invidious discrimination towards employees, such as Petitioners, of the employers (such as Eastern) with whom the union deals in

collective bargaining. Steele vs. Louisville & Nashville R. Co., 323 U.S. 192, 89 L. Ed. 173, 15 LRRM 808 (1944); Brotherhood of Railroad Trainmen, et al, vs. Howard, 343 U.S. 767, 30 LRRM 2258 (1952); Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen, U.S. 210, 89 L. Ed. 187, 15 LRRM 715 (1944); Graham vs. Brotherhood of Firemen, 338 U.S. 232, 25 LRRM 2033 (1949); Conley vs. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957); Richardson vs. Texas & New Orleans RR Co., 242 F. 2d 230, 39 LRRM 2593 (CA 5, 1957); Syres vs. Oilworkers Union, 223 F 2d 739, 36 LRRM 2290, (CA 5, 1955) Reversed, 350 U.S. 892, 37 LRRM 2068; Central of Georgia R. Co. vs. Jones, 229 F. 2d 648, 37 LRRM 2435 (CA 5, 1956(, Cert. Denied; 352 U.S. 848, 38 LRRM 2716; Rolax vs. Atlantic Coast Line R. Co., 186 F 2d 473, 27 LRRM 2240 (1951); Thompson vs. Brotherhood of Sleeping Car Porters, F 2d, 63 LRRM 2111 (Sept. 1966).

While the Howard and Steele line of cases, which first established this said duty of RLA unions, dealt specifically with hostile and invidious discrimination based upon race, the Courts have made clear that the doctrine of those cases is not limited to racial discrimination alone, but extends to any other basis of hostile and invidious discrimination by RLA unions. Mount vs. Locomotive Engineers, 226 F 2d 604, 37 LRRM 2034 (CA 6, 1955); Cunningham vs. Erie Railroad, et al, 266 F 2d 411, 44 LRRM 2093 (CA 2, 1959); Thompson vs. Brotherhood of Sleeping Car Porters, 316 F 2d 191, 52 LRRM 2880 (1963); Brady vs. Trans World Airlines, 174 F. Supp. 360, 44 LRRM 2282 (D.C. Del. 1959); Ferro vs. Railway Express Agency, 296 F 2d 847, 49 LRRM 2278 (CA 2, 1961); Hargrove vs. Brotherhood of Locomotive

Engineers, 116 F. Supp. 3, 33 LRRM 2100 (D.C.D. Col. 1953) F. Supp. 681, 40 LRRM 2495 (D.C. W. Ky., 1957); Latham vs. Baltimore & Ohio RR Co., 274 F 2d 507, 45 LRRM 2534 (CA 2, 1959); Cherico vs. Brotherhood of R. R. Trainmen, 167 F. Supp. 635, 42 LRRM 2832 (S.D. N.Y., 1958).

These said implied rights of Petitioners under the RLA are personal to each of Petitioners as individual employees of Eastern; and these said personal rights and claims against ALPA did not belong to FEIA and neither was FEIA privy thereto; and thus FEIA could not have presented them in its said prior litigation. Indeed, the deciding Court in FEIA's said prior litigation expressly held that FEIA could not assert, and was not asserting, these said individual and personal claims of these individual Petitioners in its said prior litigation. That Court said:

> "It is possible to construe the first claim as one for wrongful discharge, and, indeed, individual employees discharged in violation of the Act are entitled to a remedy in the Courts. (Citations omitted) However, this remedy is available only to the individual employees and not to FEIA. . . .
>
> "It is clear from the amended or supplemental complaint that FEIA is seeking global damages for alleged wrong to it and not individual damages for such of its members who may have been wrongfully discharged." (Emphasis Added) (243 F Supp. 701, 59 LRRM 2865 (S.D.N.Y., 1965)).

Thus, your individual Petitioners were not parties, in name or in privity, to

this said prior litigation by FEIA; and neither were their said individual and personal claims adjudicated in FEIA's litigation there.

That your Petitioners do set forth a good cause of action here based upon their individual personal claims, is shown by the District Court's finding in its dismissal opinion, where the Court said: ". . . It is important to note that if plaintiffs' allegations are valid, such actions would constitute a violation of the Railway Labor Act. . . ." (Appendix C)

Thus, while Petitioners' instant claims are, under the Howard and Steele rationale, based upon Petitioners' independent, individual and personal rights deriving by implication from the Railway Labor Act, FEIA's cause of action asserted in its said prior litigation, was expressly based entirely upon those specific provisions found in the Railway Labor Act (Chapter 8, Title 45, United States Code) which accorded FEIA the right to statutory recognition as the collective bargaining representative of the bargaining unit of Eastern's flight engineers for purposes of collective bargaining. The District Court in that prior litigation made this point conclusively clear when it said, as noted earlier:

> "It is clear from the amended or supplemental complaint that FEIA is seeking global damages for alleged wrong to it, and not individual damages for such of its members who may have been wrongfully discharged."

That the thrust of FEIA's said prior litigation was essentially directed solely to the end of protecting FEIA's claimed

institutional recognitional rights is further shown by the total absence of any discussion, in either of the opinions by the District Court, or the Second Circuit Court, of the Howard and Steele rationale, relied upon here by your individual Petitioners to support these individual and personal claims. A search of those decisions in FEIA's prior litigation shows that neither the District Court there, or the Second Circuit Court attempted to consider, discuss, allude to, or adjudicate your Petitioners individual and personal claims, as such, deriving from the Howard and Steele rationale.

If Petitioners present individual and personal claims had been based upon a collective bargaining contract negotiated by FEIA, then conceivably FEIA could have pressed such contractual claims under the theory that it was maintaining the integrity of its collective bargaining contract for the bargaining unit as a whole. But, Petitioners individual and personal claims here are in no way based upon a collective bargaining contract; instead, they are based wholly upon the said non-abuse duty under the RLA impliedly owed by ALPA as a powerful monopolistic union to each of Petitioners personally, as individual RLA employees.

Thus, FEIA could not assert these personal claims of Petitioners as individual employees; and this fact defeats the instant conclusion by the Fifth Circuit here, that these individual Petitioners (who were not parties there) were in privity in FEIA's said prior litigation -- presumably, by reason of some theoretical implication of law deriving from FEIA's status as the statutory collective bargaining representative of the flight engineers bargaining unit.

Just as your individual Petitioners would have no standing to assert or foreclose FEIA's statutory institutional recognitional rights before a forum, neither could FEIA have any standing to assert or foreclose these said individual, personal, and noncontractual rights of Petitioners presented here. Thus there is no element of mutuality as required by the doctrine of res judicata.

(2) THE FIFTH CIRCUIT'S INSTANT DECISION HAS, IN EFFECT, INDIRECTLY REJECTED THIS COURT'S MAJORITY DECISION IN THE HOWARD CASE, AND HAS ADOPTED THE DISSENTING OPINION IN HOWARD:

Briefly stated, the Howard proceeding was a class action asserting that the defendant union and the employer there had violated an implied duty owed to that plaintiff class under the RLA by engaging in hostile and invidious discrimination against them because of their race. The defendant union there was the statutory collective bargaining representative for a bargaining unit consisting of an all white bargaining unit of brakemen; while the plaintiff class consisted of a much smaller bargaining unit of negro employees who were represented in collective bargaining by another union, which was not a party to that proceeding. Among other things the Complaint there alleged that the Brotherhood:

> ", . . had for years used its influence in an attempt to eliminate negro trainmen and get their jobs for white men who, unlike colored 'train porters', were or could be members of the Brotherhood. . . . the Brotherhood finally forced the Frisco to agree to discharge the

colored 'train porters' and fill their jobs with white men who, under the agreement, would do less work, but get more pay.

". . . (that the defendant Brotherhood) . . . had continually carried on a program of aggressive hostility to employment of negros for train, engine and yard service....

". . . that while this agreement did not in express words compel discharge of 'train porters', the economic unsoundness of keeping them after transfer of their 'brakemen' functions made complete abolition of the 'train porters' group inevitable. . . ."

The dissenting opinion in Howard objected to the majority opinion upon the grounds, First, that the defendant union did not represent the plaintiff class of "train porters" under the Act, and therefore the defendant union owed plaintiffs no duty to refrain from such hostile discrimination and exercise of its bargaining power and franchise. The majority, of course, rejected this viewpoint.

And Second, the dissent in Howard urged that the entire dispute was within the exclusive jurisdiction of the National Mediation Board, and in this respect the dissent there said:

". . . I think there was a dispute here between employees of the carrier as to whether the Brotherhood was the representative of the train porters, and that this is a matter to be resolved by the National Mediation Board, not the

> Courts. I would remand this case to the District Court to be dismissed as nonjusticiable."

But, the majority rejected this jurisdictional argument and stated in respect thereto:

> ". . . Nor does the dispute hinge on the proper craft classification of the porter so as to call for settlement by the National Mediation Board. . . . For the contention here with which we agree is that the racial discrimination practice is unlawful, whether colored employees are classified as 'train porters', 'brakemen', or something else.
>
> "Bargaining agents who enjoy the advantages of the Railway Labor Acts provisions must execute their trust without lawless invasion of the rights of other workers (Emphasis added)

Thus, the Court in Howard made clear that RLA employees who are adversely affected by an RLA union's abuse of its statutory power and franchise by hostile and invidious discrimination against such employees (even if done in the context of a representational and jurisdictional contest with a rival union), have an individual and personal claim against such RLA union; and, that this individual and personal cause of action in such employees is independent of any possible simultaneous institutional recognitional claim that the statutory collective bargaining representative of such abused employees might have in its own right under the Act. It should be recalled in this respect that the plaintiff class of

employees in the Howard proceeding, were represented in collective bargaining under the RLA by a union that was not a party to that proceeding.

Even if it were possible for FEIA to have exercised standing to present Petitioner's individual and personal claims deriving from the Howard and Steele rationale in FEIA's said prior litigation (although FEIA clearly did not, and could not, do so, and the District Court there expressly stated, as noted above, that FEIA did not do so), it must still be concluded that FEIA did not assert Petitioners' individual and personal claims there, by reason of the fact that neither the District Court or the Second Circuit considered, discussed, or even alluded to, the Howard and Steele rationale which is the basis for Petitioners' individual and personal claims presented here.

(3) THE FIFTH CIRCUIT'S GENERAL PRESUMPTION, THAT A UNION (HERE, FEIA) WHICH REPRESENTS A BARGAINING UNIT OF EMPLOYEES UNDER THE ACT BECOMES PRIVY TO A BARGAINING UNIT EMPLOYEE'S INDIVIDUAL AND PERSONAL RIGHTS, BY REASON OF THE UNION'S STATUS AS SUCH, DOES THE GREATEST VIOLENCE TO THE SECURITY OF INDIVIDUAL EMPLOYEES, AND UNNECESSARILY SUBJECTS EMPLOYEES TO TYRANNY BY POWERFUL UNIONS:

By operation of law a statutory collective bargaining representative has the power to represent all employees in the bargaining unit, even though a substantial minority of employees therein voted against that representative in its certification election. Thus, such union frequently acquires and maintains its bargaining powers and franchise by

operation of law, and not through a consensual arrangement.

Since there was no consensual basis whatever to support the Fifth Circuit's presumption of privity between your individual Petitioners here and FEIA, as to FEIA's said prior litigation in the Second Circuit, the Fifth Circuit apparently based its presumption of privity simply upon FEIA's then current status as the union having collective bargaining prerogatives for the bargaining unit in which Petitioners were then employed. In other words the Fifth Circuit, in effect, has apparently presumed that the Railway Labor Act (and perhaps the National Labor Relations Act) extinguishes all individual and personal rights of employees in a union's bargaining unit, and by operation of law merges the employee's individual and personal rights into the union's institutional rights.

But, while this presumption might be valid in the limited sense that collective bargaining as to wages, hours and terms and conditions of employment replaces individual bargaining with the employer, that more general presumption of privity through such merger, as here construed by the Fifth Circuit, finds no support in the history of the enforcement of either the RLA or the National Labor Relations Act.

As to the National Labor Relations Act, the proviso in Subsection (a) of Section 9 of that Act, 29 USC Section 159(a), reserving some measure of autonomy over individual grievances to the individual employee, suggests that the Federal Labor Policy is not to wholly merge and obliterate bargaining unit

employees' individual and personal rights with the union's institutional rights even in the purely collective bargaining area.

Similarly, this Court has pointed out that the individual political rights and preferences of bargaining unit employees are not merged into the political rights and preferences of the union as an institution. Machinest Union, et al vs. Street, et al, 367 U.S. 740, 48 LRRM 2345 (1961).

To further illustrate the independence of the individual and personal rights of a bargaining unit employee from the institutional rights of the union representing the bargaining unit, and thus the lack of privity between the individual employee and the union in respect thereto (at least, as to these individual and personal rights of an employee which do not derive from a collective bargaining contract), it seems fair to suggest that a union representing a collective bargaining unit would not by reason of such status have standing to usurp or preclude an individual bargaining unit employee's right to file, process, and litigate or settle a claim for State Workmen's Compensation; or a claim for State Unemployment Compensation, or a claim under wage and hour laws, or other personal claims that a bargaining unit employee might have against his employer of a tort or civil nature (and not involving a collective bargaining contract claim).

And further, it would seem fair to assume that a union representing a collective bargaining unit would have no privity or standing to usurp or preclude

the right of a bargaining unit employee to sue a competing rival union for its infliction of personal bodily injuries upon the bargaining unit employee, in the context of, and in furtherance of, a representational or jurisdictional dispute between such competing rival union by and through its authorized agents, and the injured employee's union.

For instance, if during the contest of this alleged representational or jurisdictional dispute between ALPA and FEIA, ALPA, by and through its authorized agents, had inflicted personal bodily injuries upon Petitioners as part of its efforts to further its ouster of Petitioners from their jobs, then presumably Petitioners would clearly have had individual personal claims against ALPA for such bodily injuries, as to which only such injured employees would have had standing to sue. And, presumably FEIA would have had no standing or privity as a party plaintiff in such proceeding to assert the bodily injury claims of the injured bargaining unit employees; notwithstanding, that the incumbent union, FEIA, would presumably have had standing to assert its simultaneous institutional representational or jurisdictional rights, deriving from the same course of conduct, before an appropriate forum. It would further seem fair to assume, in respect to this analogy, that the personal injury proceeding by the bargaining unit employees in such case, Petitioners here, would not preclude or effect FEIA's institutional proceeding before the National Mediation Board; and the converse of this proposition would likewise seem to be true.

These examples further illustrate the lack of mutuality and other necessary elements in the Fifth Circuit's general presumption of privity as between FEIA and your individual Petitioners, which are required by the doctrine of res judicata. Bigelow vs. Old Dominion Copper Mining & Smelting Co., 225 U. S. Ill. 56 L. Ed. 1009 (1911); Troxell vs. Delaware, Lackawanna & Western Railroad Co., 227 U.S. 434, 57 L.Ed. 586 (1912); North Carolina Railroad Co., vs. Story, 268 U.S. 288, 69 L. Ed. 959, 962 (1924); Railway Employees Department of American Federation of Labor vs. Virginia Railway Co., 39 F. Supp. 354 (D.C. Va. 1941); United States, Libeland & Appellant vs. The Haytian Republic et al, 154 U.S. 118, 38 L. Ed. 930, 934 (1893); Hughes vs. United States, 4 Wall 232, 18 L. Ed. 303 (1866); Radford vs. Myers, 231 U.S. 725, 58 L. Ed. 454 (1913); Barnett vs. Wolfolk, 140 SE 2d (Supreme Court of Appeals, W. Va. (1965); Stanley, Trustee vs. Dominy, 196 Ga. 192 (1943).

(4) THE FIFTH CIRCUIT COURT'S GENERAL PRESUMPTION OF PRIVITY AS BETWEEN FEIA AND YOUR INDIVIDUAL PETITIONERS HERE, AND ITS ACCOMPANYING CONCLUSION, THAT FEIA'S PRIOR LITIGATION PRECLUDES YOUR INDIVIDUAL PETITIONERS' PERSONAL CLAIMS PRESENTED HERE, TEND TO EMASCULATE THE PERSONAL RIGHTS AND PROTECTION AFFORDED PETITIONERS BY THE HOWARD AND STEELE RATIONALE AGAINST ABUSES BY POWERFUL UNIONS (SUCH AS ALPA), AND THUS INDUCES OTHER POWERFUL AND MONOPOLISTIC UNIONS TO SUCH COERCIVE ACTS AGAINST EMPLOYERS AND EMPLOYEES:

By concealing your Petitioners' individual and personal rights asserted here under the cloak of privity, so as to bar Petitioners' individual and personal claims under principals of res judicata supposedly

deriving from FEIA's said prior litigation in the Second Circuit, the Fifth Circuit Court has established a precedent which in large part extinguishes the protection afforded individual employees under the Howard and Steele rationale against coercion by aggressive, powerful and sometimes monopolistic unions.

The natural and probable result of such an extension of principles of privity, whereby individual employees are thus denied personal recourse against abuses of their individual job rights by powerful unions, would be an invitation to such powerful monopolistic unions to substitute threats, strikes and ruinous economic coercion and featherbedding for the democratic election and jurisdictional dispute provisions and procedures provided in both the RLA, and the National Labor Relations Act, as amended, as the means of resolving such disputes.

Consequently, such an extension of principles of privity by the Fifth Circuit Court is repugnant to the Federal Labor Policy requiring a union, wishing to expand its representational or jurisdictional scope, to do so only by free persuasion in a democratic election and by available administrative procedures --not by exerting, as did ALPA here, ruinous economic coercion against an employer (here Eastern) to oust all employees who do not support its designs.

For, it would be safe to say that if ALPA, notwithstanding its monopolistic power and grasp upon the aviation industry, had known that its ruinous coercive featherbedding against Eastern, as a means of ousting these individual Petitioners, would expose it to the relief

sought here, then ALPA would most certainly have confined its expansion efforts to the available statutory procedures. And thus, Eastern and your Petitioners would have been saved many millions of dollars and frightful hardships.

(5) EVEN IF THE COURT SHOULD CONCLUDE THAT RESPONDENT EASTERN (AS TO WHOM PETITIONERS SEEK NO DAMAGES) IS UNDER NO DUTY TO REINSTATE YOUR INDIVIDUAL PETITIONERS, UNDER THE CIRCUMSTANCES PRESENTED HERE; NEVERTHELESS, YOUR PETITIONERS ARE, IN SUCH EVENT, ENTITLED TO THE REQUESTED REMEDY AGAINST ALPA, SINCE THE IMPLIED DUTY OWED BY ALPA TO PETITIONERS UNDER THE RLA IS INDEPENDENT OF ANY DUTY OWED BY EASTERN TO THE PETITIONERS UNDER THE ACT:

While Petitioners believe that under the law they are entitled to the remedy of reinstatement as to Eastern, nevertheless if this Court, in its wisdom, should conclude that Eastern should not be held to the reinstatement of Petitioners in view of the fact that Eastern's conduct complained of here came about solely as a result of ruinous economic compulsion imposed upon Eastern by ALPA; then in such case, Petitioners urge the Court to grant your individual Petitioners their day in court so that their individual and personal claims against ALPA might be fully and fairly adjudicated to an equitable conclusion as provided by law.

CONCLUSION

Based upon the foregoing, your Petitioners show: That they assert here claims which are personal to them as individual RLA bargaining unit employees; that these individual and personal rights of Petitioners are implied from the RLA,

and derived from a duty owed your Petitioners by Respondent ALPA, as an RLA union, which duty prohibited ALPA from abusing its statutory bargaining power and franchise through hostile and invidious discrimination against Petitioners as Individual RLA employees; and

That, while FEIA was the union that formerly served as the statutory collective bargaining representative for the bargaining unit of Eastern's flight engineers, in which unit Petitioners were formerly employed, nevertheless FEIA had no standing to bring Petitioners' instant individual and personal claims in FEIA's said prior litigation in the Second Circuit; since, Petitioners' rights asserted here, being implied from the RLA, do not derive from a collective bargaining contract, and these rights are personal to Petitioners individually; and

Thus, since FEIA had no standing to assert Petitioners' individual and personal rights in its said prior litigation; just as Petitioners would have had no standing to assert before the proper forum FEIA's institutional representational or jurisdictional rights expressed in the RLA, there was no privity between FEIA and these individual Petitioners as to FEIA's said prior litigation; and

That, if this Court should determine that Petitioners were not entitled to the remedy of reinstatement as to Eastern, in view of the fact that Eastern's actions complained of here resulted solely from the substantial economic coercion imposed upon Eastern by ALPA, as alleged in the complaint; then in such case, Petitioners are nevertheless entitled to their requested remedy against ALPA in the event

the allegations of the complaint are properly proved upon the trial of this matter.

Respectfully submitted this _____ day of May, 1968.

GILBERT & CARTER

By_____
Warren S. Gritzmacher

919 First Federal Building
Atlanta, Georgia 30303

By_____
Thomas L. Carter, Jr.

919 First Federal Building
Atlanta, Georgia 30303

Attorneys for Petitioners

PROOF OF SERVICE

This _____day of May, 1968, I have mailed two (2) copies of PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to Mr. W. Glen Harland, Attorney at Law, Eastern Air Lines, Inc., Legal Department, 10 Rockefeller Plaza, New York, New York 10020 and Cohen and Weiss, Attorneys at Law, 605 Third Avenue, New York, New York 10016, Attorneys for Respondents.

_____
Warren S. Gritzmacher

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24626

D. C. Docket No. CA 9595

JOHN A. ACREE, ET AL.,
Appellants,

versus

AIR LINE PILOTS ASSOCIATION, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and GEWIN and WRIGHT,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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*Of the District of Columbia Circuit sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, John A. Acree, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 13, 1968

Issued as Mandate: Mar 7, 1968

APPENDIX C

ORDER OF DISTRICT COURT GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Number and title omitted)
(Filed: Jan. 25, 1967)

The defendants in the above-styled action have filed motions to dismiss on the basis that the Court lacks jurisdiction and that the instant action is barred by the principle of res judicata.

The basis of the plaintiffs' complaint is that the defendants conspired in violation of the Railway Labor Act to deprive the plaintiffs of their positions with Eastern Air Lines.

The plaintiffs, as former flight engineers of Eastern Air Lines, Inc., have sued individually and on behalf of all flight engineers who were employed by Eastern on June 22, 1962. These former flight engineers, including the name plaintiffs, are the same persons who, as of June 22, 1962, were represented by EAL Chapter, Flight Engineers International Association.

Plaintiffs have requested injunctive relief, including an order directing Eastern to reinstate plaintiffs to its employ as flight engineers, a judgment declaring that conduct by defendants during and prior to a 1962 strike by Flight Engineers International Association against Eastern amounted to a conspiracy to deprive plaintiffs of their employment, and a judgment of more than $29,000,000 in compensatory and punitive damages against the defendant Air Line Pilots Association International.

The first issue which must be considered is that of jurisdiction. It is important to note that if the plaintiffs' allegations are valid, such actions would constitute a violation of the Railway Labor Act. It is clear that a mere allegation of a Railway Labor Act violation does not create federal court jurisdiction. General Committee v. Missouri-Kansas-Texas Railway Company, 320 U.S. 323 (1943).

In an attempt to establish jurisdiction, the plaintiffs allege hostile and invidious discrimination, thereby seeking to bring the case within the line of cases represented by Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944), and Brotherhood of Railroad Trainmen, et al. v. Howard, 343 U.S. 768 (1952).

However, it is clear that the instant case does not fall within the doctrine of the Steele and Howard cases. It has been previously determined that complaints alleging matters and seeking relief which would directly or collaterally affect a representation decision of the National Mediation Board will not be heard. FEIA v. Eastern Air Lines, Inc., 359 F. 2d 303 (1966); Ruby v. American Airlines, Inc., 323 F. 2d 248 (1963), cert. den. 376 U.S. 913 (1964).

The principle enunciated in the above cases is basic and is a rudimentary principle of the law governing labor relations. Simply stated the principle is as follows: Congress has chosen to set up an administrative board, the National Mediation Board, to hear representative disputes. If a party is dissatisfied with the determination of that body, its recourse is to appeal the matter to the Court of

Appeals where review - though limited - is available. See Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943). Thus, as the matter is one for determination by the Board, the claim is one which is beyond the subject matter jurisdiction of the district court. For the reasoning behind this principle, see FEIA v. Eastern Air Lines, Inc., supra, at 307-309.

In summary, the Court is of the opinion that it is without jurisdiction of the subject matter of the instant controversy. Not only is such a conclusion in line with a prior determination by another district court in a case involving the litigation of the same issues by the representative of the plaintiffs and the defendants, but it is also necessitated by the administrative structure created by Congress to handle matters arising under the Railway Labor Act. To rule otherwise would be to emasculate the power of the Board and to negate the value of its existence.

Though the Court is of the opinion that the instant case must be dismissed for lack of subject matter jurisdiction, it may be of value to examine the defendants' second basis in support of their motions to dismiss.

The defendants urge that even under the assumption that the Court has jurisdiction in the instant case the motion to dismiss must be granted on the bais of res judicata.

The basis of the plaintiffs' complaint is that the defendants conspired to discharge them and that such discharge was wrongful.

This complaint was dealt with and determined to be without merit in several decisions by the federal judiciary. See FEIA, EAL Chapter v. Eastern Air Lines, 208 F. Supp. 182 (1962), aff'd. per curiam 307 F. 2d 510 (1962), cert. den. 372 U.S. 945 (1963); FEIA v. Eastern Air Lines Inc., 243 F. Supp. 701 (1965), aff'd 359 F. 2d 303 (1966). Thus, in view of the fact that it has been determined previously, both judicially and administratively, that the discharges were not wrongful, the only remaining question to be answered is whether the plaintiffs in the instant case were in privity with the FEIA in the above litigations. Obviously, if the plaintiffs were in privity with the plaintiff who asserted the same cause of action in a prior suit which the plaintiffs seek to litigate here, the principle of res judicata bars this action.

Under the plaintiffs' allegation, it seeks to bring a class action on behalf of all members of FEIA who were discharged by Eastern. The FEIA was an unincorporated association acting as the personal representative of the plaintiffs. In sum, the FEIA was composed of the class which plaintiffs seek to represent; as an unincorporated association, it was no more nor no less than the class itself.

In conclusion, it is inherent in the principle of res judicata that a person whose interest was represented by one having authority to represent him is bound by the judgment even if he was not a formal party to the action. Hansberry v. Lee, 311 U.S. 32 (1940). It is obvious that the plaintiffs were aware of the legal efforts of their representative, and that their complaints have been

given a fair hearing before the federal bench.

Thus, the Court is of the opinion that the defendants' motion to dismiss must be granted on the basis that the Court is without subject matter jurisdiction, and that, even assuming the presence of such jurisdiction, the instant action would be barred under the principle of res judicata.

Therefore, the defendants' motion to dismiss is granted.

IT IS SO ORDERED.

This the 25th day of January, 1967.

s/ Lewis R. Morgan
LEWIS R. MORGAN

United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 173 - September Term, 1965.
(Argued January 4, 1966
Decided April 12, 1966.)
Docket No. 29997

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION,
EAL CHAPTER, AFL-CIO,
Appellant,

-v.-

EASTERN AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION,
Appellees.

B e f o r e:

MOORE, SMITH and ANDERSON,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Dudley B. Bonsal, Judge, granting summary judgment in favor of the defendants and directing the dismissal of plaintiff's amended or supplemental complaint for lack of jurisdiction over the subject matter. Affirmed.

I. J. GROMFINE, WASHINGTON, D.C.
(Herman Sternstein, William B. Peer, and Zimring, Gromfine &

Sternstein, all of Washington, D.C., and Patt & Heimowitz, New York, N.Y., with him on the brief), for appellant.

GEORGE G. GALLANTZ, New York, N.Y. (Larry M. Lavinsky, Saul G. Kramer, and Proskauer Rose Goetz & Mendelsohn, all of New York, N.Y.; W. Glen Harland and Gambrell, Harlan, Russel & Moye, Atlanta, Ga; with him on the brief), for appellee Eastern Air Lines.

HERBERT A. LEVY, New York, N. Y. (Henry Weiss and Cohen and Weiss, all of New York, N.Y., with him on the brief), for appellee Air Line Pilots Association.

MOORE, Circuit Judge:

This appeal presents another facet of the drawn-out controversy between the defendant Eastern Air Lines, Inc. (Eastern), the plaintiff Flight Engineers International Association, EAL Chapter, AFL-CIO (FEIA), and the defendant Air Line Pilots Association (ALPA). Portions of the controversy have previously come before the Civil Aeronautics Board, the National Mediation Board, and a variety of courts.

The opinion of the District Court ably sets forth the background of the dispute. 243 F.Supp. 701 (S.D.N.Y. 1965). Only the barest summary is necessary here.

Federal regulations require a crew of three - a pilot, a copilot, and a

certified flight engineer - in certain of the larger commercial aircraft. ALPA, which represented Eastern's pilots and co-pilots, and FEIA, which represented Eastern's flight engineers, clashed in 1958 over the license requirements of the flight engineer, the "third man in the cockpit." FEIA maintained that he should hold a mechanic's license (A & E license), held by FEIA members but not generally held by ALPA members. ALPA maintained that he should hold a pilot's license (P & I license), held by ALPA members but not generally held by FEIA members. After a strike by FEIA, Eastern agreed to a four-man crew, one member of which had to have a mechanic's license but did not have to have a pilot's license. This arrangement continued until 1962, with occasional strikes by FEIA and repeated attempts by presidential commissions and boards to solve the underlying problem of who should fill the third seat in the cockpit.

On June 23, 1962, FEIA again went out on strike, causing Eastern to shut down operations. In Mid-July Eastern offered to give pilot's training to FEIA flight engineers so that they would be eligible for occupancy of the third seat. FEIA did not accept the offer within the time set. Eastern then made the same offer individually to each of the striking engineers, informing them that if they did not report to work by July 24th, they might be replaced. On August 10, 1962, Eastern made a final proposal to the striking flight engineers, promising them prior job rights on propeller equipment but not on jets, and stating that those who did not accept the offer by August 16th would lose all prior job rights. Under the terms of agreements which Eastern reached with ALPA during this period, pilots who applied for the position of "pilot

engineer" - the new title given to occupants of the third seat in the cockpit - would suffer no loss of their pilot seniority.

On August 10th, Eastern began to replace the striking flight engineers with ALPA pilots and on August 25th Eastern notified all flight engineers still out on strike that they had been permanently replaced. FEIA and some of the striking flight engineers wrote Eastern on August 27, 1962, demanding that their discharge be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern rejected these demands on the grounds that the bargaining agreement had been terminated.

On September 27, 1962, FEIA offered to end the strike along the lines of settlement proposed by Eastern in July, provided that striking flight engineers could return to work in order of seniority. Eastern declined on the grounds that the strikers had been permanently replaced, so that there was no basis for further negotiation.

On September 28, 1962, FEIA informed Eastern that it would raise the replacement of the flight engineers as a formal grievance before the System Board of Adjustment established by the parties under the Railway Labor Act. Eastern refused to participate. As a result, the Mediation Board did not appoint a neutral member to the System Board of Adjustment.

Previous Litigation

FEIA has been seeking redress from Eastern and ALPA, together or separately, before a range of administrative and

judicial bodies since the summer of 1962, for wrongs alleged to have been committed during the summer of 1962. The history of these efforts is necessary to the resolution of the problem before us.

In the union's first attempt at administrative review, FEIA filed a complaint with the CAB alleging that Eastern had violated Section 410(k)(4) of the Federal Aviation Act, 49 U.S.C. §1371(k)(4), which makes compliance with the Railway Labor Act a condition for the holding of a certificate by an air carrier. The complaint alleged a number of violations of the Railway Labor Act by Eastern. The CAB dismissed the complaint, partly on the grounds that similar grievances were the basis of pending actions in the courts, and partly because the uncertain nature of the FEIA representation of the flight engineers was a question for the National Mediation Board to decide. The Court of Appeals for the District of Columbia Circuit held that this dismissal was not an abuse of discretion by the CAB, although the Court indicated that it believed the CAB had some independent jurisdiction to decide whether the Railway Labor Act had been violated. 332 F.2d 317 (D.C. Cir. 1964).

In 1964 FEIA sought a preliminary injunction to enjoin the National Mediation Board from holding an election to determine the bargaining representative of the flight engineers then working for Eastern, on the grounds that in determining who was qualified to vote in the representation election, the National Mediation Board had refused to investigate FEIA's charges of unfair labor practices. The district court held that the Mediation Board was

under no duty to hold hearing on such charges. 230 F. Supp. 611 (D.D.C. 1964). The Court of Appeals affirmed, indicating that the Mediation Board had made some investigation as to the voting rights of the ALPA pilots who had replaced FEIA engineers. 338 F. 2d 280 (D.C. Cir. 1964).

In the summer of 1962 FEIA brought suit in the Southern District of New York, seeking a preliminary injunction against Eastern on the grounds that Eastern had failed to bargain as required by the Railway Labor Act, and had bargained improperly by withdrawing earlier offers to the union and by writing to the individual employees The district court denied the relief requested on the grounds that FEIA had shown no clear and convincing evidence of unfair labor practices and had not demonstrated a reasonable probability of success after trial. This court affirmed on the opinion below. 208 F. Supp. 182 (S.D.N.Y.), aff'd per curiam, 307 F. 2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963).

FEIA started the present suit against Eastern and ALPA in the Southern District of New York on August 21, 1962, requesting that the defendants be preliminarily enjoined from alleged violations of the Railway Labor Act. The district court found on the merits that the procedures for bargaining under the Act had been exhausted so that the parties were free to resort to economic self-help; that Eastern had bargained in good faith with FEIA; and that Eastern had not conspired with ALPA against FEIA. The court denied the request for a preliminary injunction on the grounds that FEIA had not shown a reasonable chance of success at a full trial. 45 CCH Lab. Cas. ¶17,814 (1962). This court affirmed on

the ground that since the case involved problems of representation and problems of jurisdiction between labor unions, the district court was without jurisdiction to grant the relief which the plaintiff sought. 311 F.2d 745 (2d Cir.), cert. denied, 373 U.S. 924 (1963). In February 1964 FEIA filed an amended or supplemental complaint against Eastern and ALPA, requesting not only an injunction against Eastern ordering it to recognize FEIA as the exclusive bargaining representative of the flight engineers, but also a declaratory judgment declaring that the many agreements between Eastern and ALPA (November 12, 1958, January 1, 1959, July 20, 1962, August 3, 1962, and August 6, 1962) were void and unenforceable; a mandatory injunction directing that Eastern reinstate the striking FEIA flight engineers without prejudice, "ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers"; and a judgment for damages of $11,500,000, together with a similar sum "as exemplary damages."

Both defendants moved for summary judgment dismissing the amended complaint on the ground that the court was without jurisdiction to grant the relief requested. The district court granted the defendants' motions, partly on the ground that there was no evidence of violations of the act and partly on the ground that the district court lacked jurisdiction of the subject matter. 243 F. Supp. 701 (S.D. N.Y. 1965).

Much of the original complaint survives unaltered in its amended successor; and the passage of time has made these portions of the complaint no more a subject for judicial relief than they were at the time of the previous appeal. They still

involve jurisdictional and representational disputes between the two unions - disputes which, under the Railway Labor Act, are "for non-curial treatment." FEIA v. Eastern Air Lines, 311 F. 2d 745 at 748 (2d Cir.), cert. denied, 373 U.S. 924 (1963).

The amended complaint contains several new allegations: that the striking FEIA members were wrongfully discharged; that Eastern unlawfully conditioned the strikers' return to work on their relinquishment of seniority rights, and unlawfully gave superseniority to the ALPA replacements; and that Eastern unlawfully refused to process the grievances of the discharged employees and prevented the effective review of those grievances by the System Board of Adjustment.

These so-called new allegations (the replacement of the strikers, the demand for reinstatement of the discharged engineers and money damages) must be examined in the light of the many previous proceedings and decisions involving the controversies between Eastern, FEIA and ALPA as to the pilot-engineer status in the cockpit.

FEIA concedes that the determination of which union is to represent the occupants of the third seat in the cockpit is left to the National Mediation Board by Section 2, Ninth, of the Railway Labor Act. The National Mediation Board has made this determination. After deciding that both the strikers and their replacements could vote to choose a bargaining representative, it conducted a representation election, as a result of which it certified ALPA as the bargaining representative of the occupants of the third seat.

The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies "in the teeth of the board's certification" of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the board's certification of that union. Order of Railway Conductors v. Pennsylvania R.R., 323 U.S. 166, 172 (1944). As the complaint itself recognizes, Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants.

The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never care to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claims that the Railway Labor Act had been violated - a result which would clash with the evident congressional intent to have disputed questions of representation in an industry so charged with the public interest disposed of rapidly. See Ruby v. American Airlines, Inc., 323 F. 2d 248, 256 (2d Cir. 1963), cert. denied, 376 U.S. 913 (1964).

We do not mean to say that courts may never consider claims that the Railway Labor Act has been violated, if two unions are present. The second Ruby case makes clear

that even if two unions are on the scene, such claims may be heard by the courts in certain circumstances. Ruby v. American Airlines, 329 F. 2d 11 (2d Cir. 1964), vacated as moot sub nom. O'Connell v. Manning, 381 U. S. 277 (1965). But in that case, the issue was whether a court could order an employer to bargain with a union (the one most recently certified by the National Mediation Board); and that issue had been heard by no other court or administrative body. The allegations here more directly affect questions of representation; the relief requested, if granted, would to a large extent conflict with the certification of ALPA by the board; and many of the questions presented have previously been considered on the merits by the courts.

FEIA maintains broadly that Congress did not intend in the Railway Labor Act to create rights without remedies, and that as a result courts should step in to hear Railway Labor Act complaints where administrative agencies have declined to do so. The law is not that simple; nor is it application to the facts of this case. The Mediation Board considered the legality of the replacement of the strikers, at least to the extent of holding that the replacements were entitled to vote in the representational election. See FEIA v. National Mediation Board, 338 F. 2d 280, 282 (D.C. Cir. 1964).

Judge Levet found that the third seat positions on Eastern's jets were filled by replacements before Eastern's letter of August 3, 1962. This finding cuts the heart out of FEIA's argument that Eastern unfairly discriminated against the strikers by denying them access to work on jets. Judge Levet also found Eastern's temporary contracts with ALPA

were fair, and that Eastern had completely and permanently replaced all the strikers by August 25, 1962 - a finding inconsistent with FEIA's present claim that its members were discharged before they had been replaced. 45 CCH Lab. Cas. ¶17,814 (1962).

Moreover, it seems clear that Congress did not intend courts to hear claims under the Act whenever no administrative body would hear them. In certain narrow areas, where the command of the statute is clear and the issue does not impinge on one committed for resolution to other bodies, judicial enforcement of the Railway Labor Act has been held proper. E.g., Virginia R'y v. System Federation No. 40, 300 U.S. 515 (1937). Courts may also require the Mediation Board to carry on its statutory duties to investigate and to certify. Air Line Dispatchers Association v. National Mediation Board, 189 F. 2d 685 (D.C. Cir.), cert. denied, 342 U.S. 849 (1951). But the history of the Railway Labor Act, as interpreted by the Supreme Court, makes clear that in all other areas,

> "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation,

> mediation and arbitration . . . Courts should not rush in where Congress has not chosen to tread."

General Committee of Adjustment v. Missouri-Kansas-Texas R.R., 320 U.S. 323, 337 (1943).

To grant the judicial relief requested in FEIA's wholesale attack on the replacement of the strikers would directly affect the previous determination of the representational dispute by the National Mediation Board,[1] would reopen a controversy which has plagued the airlines for years and which has been fought to a rough conclusion by resort to the self-help envisaged by the act; and would lay down a precedent that would mean the inordinate protraction of comparable struggles in years to come. For these reasons, we do not feel that courts should consider the claims for judicial relief in FEIA's amended complaint which are directly connected with the replacement of the strikers.

The last of the new allegations in the amended complaint, concerning Eastern's refusal to process grievances and its paralyzing of the System Board of Adjustment, raises somewhat different problems.

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[1] As the trial court stated in its opinion, "moreover, to entertain FEIA's claims for reinstatement of its members would be to bring into issue the certification of the Mediation Board of ALPA as the bargaining agent for Eastern's flight engineers." (243 F. Supp. at 707.)

The facts underlying FEIA's allegation are as follows. After Eastern told the striking engineers that they had been permanently replaced, FEIA and some of the strikers requested that the discharge of the engineers be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern refused to do so on the theory that the agreement had been terminated. The union attempted to bring the matter before the System Board of Adjustment, but the System Board split 2-2 on the problem. The collective bargaining agreement provided that if the System Board could not agree within a certain time, "it shall request the National Mediation Board to name a referee." Only the employee members of the System Board requested the naming of a referee, and the Mediation Board held that it had no power to name a referee under the circumstances. The District Court for the District of Columbia upheld the position of the Mediation Board, FEIA v. National Mediation Board, 230 F. Supp. 611 (D.D.C.), aff'd on other grounds, 338 F. 2d 280 (D.C. Cir. 1964). FEIA maintains that Eastern's refusal to join in the request for the appointment of a neutral referee was in violation of Eastern's duty under Section 204 of the Railway Labor Act "to establish a board of adjustment."

This issue is properly one for judicial consideration, since the relief requested is not the circumvention of the act's provisions for adjustment and mediation, but rather the enforcement of those provisions. IAM v. Central Airlines, Inc., 372 U.S. 682, 690 (1963); Aaxico v. Air Line Pilots Association, 331 F. 2d 433, 437 (5th Cir.), cert. denied, 379 U.S. 933 (1964); c.f. Virginian R'y v. System Federation No. 40, 300 U.S.

515 (1937). However, we agree with the trial court that since the collective bargaining agreement between the parties had terminated, Eastern was no longer under any obligation to process as grievances the allegations of the union, or to maintain the System Board of Adjustment for the resolution of the claims here asserted by the Union.

As the Supreme Court made clear in IAM v. Central Airlines, 372 U.S. 682, 690 (1963), "the extent and nature of the legal consequences" (Deitrick v. Greaney, 309 U.S. 190, 200-201) of the duty to establish a board of adjustment under Section 204 are to be determined by the courts. In making this determination, we must bear in mind the intended function of the System Boards of Adjustment: to resolve minor disputes, i.e., disputes as to the interpretation and application of existing contracts, as opposed to "major disputes connected with a negotiation of contracts or alterations in them" (687), which the Act leaves for resolution to the processes of mediation. See Elgin, J. & E. R'y v. Burley, 325 U.S. 711, 722-24 (1945). The Act's provisions for boards of adjustment serve the same function as provisions for arbitration under the typical collective bargaining agreement - a means for deciding "the smaller differences which inevitably appear in the carrying out of major agreements. . ." 325 U.S. at 724.

As long as it appears that the underlying collective bargaining agreement is still in effect, all disputes as to grievances and their processing should be solved by resort to the System Board of Adjustment, and courts will not permit this machinery to be paralyzed by unilateral action on the part of either

the carrier or the representatives of the employees. See IAM v. Central Airlines, supra; Aaxico v. ALPA, supra.

The collective bargaining agreement between Eastern and FEIA was signed on December 31, 1958. By its terms, it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis until notice of a desire to change the agreement was served by either party on the other prior to April 1st of any year. Such a notice was sent by FEIA on February 8, 1960. Negotiations between the parties continued intermittently until February 1962, and were followed by the appointment of a presidential emergency board under Section 10 of the Act. The Board filed its report to the President on May 1, 1962, and the freezing of the situation which had been caused by the appointment of the emergency board ended thirty days later. After June 1, 1962, the contract was no longer in effect and the union was free to strike. FEIA v. Eastern Air Lines, 208 F. Supp. 182 (S.D.N.Y.), aff'd per curiam, 307 F. 2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963). Unlike the collective bargaining agreement considered in Manning v. American Airlines, 329 F. 2d 32 (2d Cir.), cert.denied, 379 U.S. 817 (1964), the status quo provisions of the Railway Labor Act had ceased to operate. Nor does FEIA suggest the existence of any conduct on the part of both parties which could serve as the basis for an argument that the parties had agreed to keep the former contract in effect although it was extinct by its own terms. The time for economic warfare had arrived, and the battle was not slow in coming.

Under such circumstances, what purpose could be served by maintaining the System Board of Adjustment? Presumably, it was still the appropriate forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect, see Elgin, J. & E. R'y v. Burley, 325 U.S. 711, 723 (1945). Conceivably it was the appropriate forum to consider the fairness or disciplinary action against the strikers, if a new agreement eventually was reached between Eastern and FEIA. International Air Line Pilots Ass'n v. Southern Airways, Inc., 44 CCH Lab. Cas. ¶17,460 (M.D. Tenn. 1962). But no such rights are asserted here. The only "grievances" are those arising from the replacement en masse of the strikers, which began after the agreement had ceased to be effective. Even if we assume that this issue, despite its large scale, would have been a "minor" dispute to be resolved by the System Board had the agreement remained in effect, the agreement was no longer in effect. All-out economic war had begun, and the replacements were Eastern's answer to FEIA's strike. Under such circumstances, Eastern was not under an obligation to maintain the System Board so that it could hear disputes of this sort. Cf. Manning v. American Airlines, 221 F. Supp. 301 (S.D.N.Y. 1963), aff'd, 329 F. 2d 32 (2d Cir.), cert. denied, 379 U.S. 817 (1964).

In summary, FEIA bases its appeal largely upon the theory that there were genuine issues of material facts relating to (1) the discharge of FEIA engineers and their replacement by ALPA pilots; (2) Eastern's refusal to bargain in good faith; and (3) Eastern's efforts to promote ALPA as the bargaining agent

instead of FEIA. However, the trial court has found that "since the agreement between Eastern and FEIA was no longer in force, Eastern was under no obligation to re-employ all the strikers" (243 F. Supp. at 708). The Court concluded that the "additional claims advanced by FEIA do not change the nature of the controversy as found by the Court of Appeals" (p. 708).[2] As to reinstatement and damages, it would follow, as the trial court held, that "since the Court is without jurisdiction of the subject matter, it is equally without jurisdiction to direct the reinstatement of the strikers or to award damages" (p. 708).

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[2] IAM v. International Aircraft Services, 302 2d 808 (4th Cir. 1962), on which FEIA relies, is readily distinguishable. In that case, arising not under the Railway Labor Act but under the National Labor Relations Act, the court held that an employer could not avoid a duty to arbitrate grievances with a union on the grounds that the union, because of the employer's allegedly unlawful replacement of union members, no longer represented a majority of the work force. Apart from the obvious differences between the breadth of the arbitration clause, there in question and the jurisdiction of the boards of adjustment under the Railway Labor Act, the union and the employer there had entered into a new collective bargaining agreement which was explicitly made retroactive to the termination date of the old agreement.

instead of FEIA. However, the trial court has found that "since the agreement between Eastern and FEIA was no longer in force, Eastern was under no obligation to re-employ all the strikers" (243 F. Supp. at 708). The court concluded that the "additional claims advanced by FEIA do not change the nature of the controversy as found by the Court of Appeals" (p. 708).[2] As to reinstatement and damages, it would follow, as the trial court held, that "since the Court is without jurisdiction of the subject matter, it is equally without jurisdiction to direct the reinstatement of the strikers or to award damages" (p. 708).

APPENDIX E

A COMPILATION OF STATEMENTS BY EXPERTS IN THE AVIATION INDUSTRY DENOUNCING ALPA'S IMPOSITION UPON EASTERN AND OTHER MAJOR AIR LINES OF THE REQUIREMENT, COMMENCING IN 1959 AND 1960, OF CARRYING A USELESS THIRD PILOT IN ALL JET COCKPIT FLIGHT CREWS:

1. Airline Industrial Relations, Pilots and Flight Engineers,

by John M. Baitsell, Associate Professor of Business Administration, Member of Labor Relations Faculty, Harvard Business School (Published 1966, by Division of Research, Harvard Business School); Excerpts Follow:

"This analysis leads one to question the judgment of the ALPA leadership over the period 1954 to 1964. In 1954 and again in 1956, ALPA endorsed a policy to the effect that the third crew member on jet aircraft would have to be pilot qualified. As originally conceived, the third crew member would have to be on the pilot's seniority list and a fully qualified pilot able to fly the aircraft. ALPA created this policy presumably based on safety but in fact such a policy was unneeded from a safety standpoint. As has been pointed out, American Airlines, several international airlines, and the U.S. Air Force have flown these planes successfully with no compromise to safety without a third pilot. The FAA consistently maintained that a pilot's qualifications for a third crew

member was unnecessary. In spite of the unnecessary qualifications which ALPA created, it was able to force at least a good measure of its policy on the domestic airlines. ALPA was unable, however, to obtain full compliance with this 1956 policy. At four carriers ALPA was able to get rid of FEIA (Flight Engineers International Association) or IAM and to obtain most of the third crew member jobs for pilots. . . . ."

"In another sense, however, by taking a strong policy stand with perhaps extreme qualifications, ALPA could appear to yield gracefully to the recommendations of presidential emergency boards and to other pressure from the government....."

"Thus, by taking a very strong position early ALPA throughout this decade was able to back off from aspects of its policy and to appear to be yielding to demands of the situation. One must keep in mind, however, that no real need existed for the policy in the first instances."

2. Federal Aviation Agency (FAA) Statement During June, 1960:

"By agreement entered into between ALPA and certain air carriers, an additional pilot flight crew member has been assigned to assist the pilot in command in the operation of . . .jet airplanes. This agreement was entered into notwithstanding the fact that such airplanes were

certified for safe operation by the FAA with a minimum flight crew of two pilots and a flight engineer. Moreover, these airplanes are still being operated safely with such a flight crew complement by all of the other air carriers not parties to such an agreement."

3. Statement by Pan American Airways, June, 1960:

"Replacement of Flight Engineers by Pilots asked

"ALPA has also proposed that Pan American's flight engineers be displaced by pilots on all jet aircraft. This displacement would violate a collective bargaining agreement with the Flight Engineers International Association AFL-CIO, extending until June, 1960, which was reached on the basis of terms proposed by the National Mediation Board.

"Your Company has a long and satisfactory history of dealing with its present flight engineer employees. They have earned the right to protection and consideration of their job rights. For ALPA to force their replacement by pilots would be wholly unfair.

"The practical relationship between pilots and the professional flight engineers has resulted in efficient and safe operation in the past, both on Pan American and other major trunk lines. On these major trunk lines, five out of six flight

engineer jobs are held by professional engineers.

"The related proposal, that the company establish a school and training facilities to train all pilots as flight engineers within one year, is, of course, out of the question. In addition to the huge and completely unnecessary cost of such a training program, it would require taking each pilot off flight duty for several months during a single year. This would disrupt flight operations to a critical point."

4. Statement by American Airlines President, July 1958:

"The point at issue is whether or not the flight engineer, in addition to proving his competency according to the standards of the CAB, should also be required to have the ability to fly the airplane. If the flight engineer must be a pilot, in addition to the other duties of his profession, then the obvious end result of that requirement would be to increase job opportunities for pilots, with a reduction in job opportunities for flight engineers who are not pilots. To that requirement, and to that end result, the flight engineers have objected. The facts of the situation are that there is need for the services of a flight engineer, and there is no need for the services of a third pilot. There are two competent qualified pilots on the airline planes and that number has been found sufficient by the CAB, by airline

experience and by the judgment of airline management.

". . . It is the opinion of the management of American Airlines, Inc., that the highest standards of operating safety will accrue if the different members of the flight crew are required to have proven competency in their own professional field. It is our opinion, preferable, as contributing most to safety, that the flight engineer prove and maintain his competency in his own field, that of flight engineer . . ."

5. Statements by National Airlines:

(a) January 1959;

"The President of the Air Line Pilots Association has been successful in forcing a few airlines to carry a third pilot on jet aircraft for what he terms 'safety reasons' - a phrase used whenever his demands are not supported by logic, reason or facts.

"Here again our jet experience totally refutes the union's efforts at featherbedding on the jets, national operated 64,827,000 jet passenger miles between New York and Miami, between December 10, 1958 and May 15, 1959, with a flight-deck crew consisting of captain, copilot, and the flight engineer; and we propose to continue with this set up. As a matter of fact, adding a third pilot to the flight crew is imposed as a type of

penalty by this association because the airlines have a valid contract with the Flight Engineers' International Association which the Air Line Pilots' Association would like to take over. Its ambitions are understandable but not praiseworthy."

(b) November, 1961;

"On the subject of qualifications, the October 17, 1961 report, at page 12, states that the flight engineer who is to serve on a three-man Turbo jet crew, shall have: (b) ability to manipulate the flight controls of the Turbo-jet airplane by reference to flight instruments to the following extent: straight and level flight, normal turns, climbs, and descents at the various normal operating speeds, but not including takeoffs and landing; (c) the training for the demonstration of the ability required by paragraphs (a) and (b) immediately above may be accomplished in a Turbo-jet simulator.

"The commission makes this recommendation '. . . in the event of an emergency created by the incapacity or unavailability of one of the two pilots. . .' This recommendation is without value, provides the ALPA with a 'face-saver', and is not in keeping with the first principle listed at page 36 of the commission's May 24, 1961 report. It does not foster safety, efficiency, and economical operation of the aircraft. In our opinion, the reverse is true - it is unsafe.

"The Federal Aviation Agency, charged with establishing and enforcing the standards to be met by flight crews, has already established the standard to be met by flight engineers on Touro-jet equipment. The Federal Aviation Agency does not require that a flight engineer on Turo-jet equipment, or any equipment, possess any pilot qualifications, or that he be given any pilot training - in a simulator or otherwise."

6. Statement by Pan American World Airways (Vice-President, E. M. Goulard), Sept. 8, 1958:

". . . We have signed a contract with the Flight Engineers International Association under which our professional flight engineers will perform the flight engineering function aboard jet aircraft. We have determined that it is not necessary or advisable that the occupants of the flight engineer station have pilot training, because we see no advantage to the company or to the pilots or to the flight engineers aboard jets in requiring training not reasonably related to the function to be discharged. . ."

7. Statement by Pan American Executive (Vice-President, Harold Gray), November, 18, 1958:

". . . In the meantime, the company is most desirous of settling the dispute through negotiations since any further delay is costly to all concerned. The principal issue, other than the pay scale, is

whether ALPA may demand the addition of an extra pilot regardless of government regulations and company policy. The company's position on these matters is as follows. Safety regulations issued by the CAB always have been and will continue to be complied with. The company feels that maximum safety will be obtained by continuing past practice rather than by adopting the pilots' union proposals. It desires to continue to use the professional Flight Engineer, who comes to this job with experience as a mechanic or an engineer, selected for his high degree of mechancial aptitude and who has perfection in this job as his primary ambition. . . ."

". . . We believe that no seriously dilute any pilot's opportunity for experience as a copilot at the controls or in command works against maximum safety. This is the result of assigning an unnecessary pilot to a crew. . . ."

". . . . The company believes that the old adage 'There is safety in numbers' is 180° wrong when numbers of pilots aboard an aircraft are increased unnecessarily."

8. Statement by Trans World Airlines (TWA), April 1962:

". . . So far as the company was concerned, the second officer was unnecessary for safe or otherwise operation of a Turbo-jet airplane. He is not required on a Turbo-jet airplane by the Federal Aviation authority. The plane was not certified to fly with him. The

manufacturer did not design the plane with a second officer in mind. The second officer has no flight controls at his station. He sits in a seat, as shown on company's Exhibit 6, directly behind the Captain, and about the only flight equipment furnished him is a radio head set and an oxygen mask."

9. Statement by S. L. Shannon, Senior Vice President of Operations, Eastern Air Lines, Inc., April, 1960:

". . . As far as I can tell, the association (ALPA) had never abandoned its idea that it was going to get rid of the flight engineers, one way or the other, and I always look at this flight engineer training for the pilots as a step in that direction. Now, that is my opinion. That is not necessarily a fact. That is just my opinion."

". . . I told them when they (ALPA) brought in this proposal of the 18th of November that we had no intention of kicking the flight engineer out of the plane and going along with their demands. . . ."

"Well, it would more or less eliminate them from the turbine aircraft on its face, unless he could be carried in the baggage department, or back there in the air, but he would be more or less eliminated from the cockpit."

10. Eastern Air Lines, Inc., June 1960:

". . . Eastern's third pilot on its DC-8-B aircraft is assigned

certain pilot duties which are performed by the Captain and second pilot on other types of Eastern's aircraft. The duties performed by Eastern's third pilot on the DC-8-B are performed by the Captain and second pilot on National's and Delta's aircraft on the same or similar types."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24626

JOHN A. ACREE, ET AL.,
Appellants,

versus

AIR LINE PILOTS ASSOCIATION, ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Georgia.

(February 13, 1968.)

Before BROWN, Chief Judge, and GEWIN and WRIGHT,* Circuit Judges.

WRIGHT, Circuit Judge: On June 23, 1962, the employees of Eastern Air Lines represented by the Flight Engineers International Association (FEIA) went on strike over the question of representation of cockpit personnel, a problem which has plagued the

* Of the District of Columbia Circuit, sitting by designation.

airlines industry since the advent of jet aircraft. In essence the dispute was a jurisdictional one between rival unions, FEIA and the Air Line Pilots Association (ALPA). The history and outcome of the dispute has been fully set out elsewhere,[1] and need not be repeated here. In the end, ALPA prevailed and in 1964 was certified by the National Mediation Board as the bargaining agent for Eastern's flight engineers. In the meantime the striking FEIA members had been replaced.

This suit is but the latest effort in an extended series of unsuccessful administrative and judicial proceedings which FEIA has brought against Eastern and ALPA charging a conspiracy between them to force FEIA members to go on strike and lose their jobs.[2] But unlike its predecessors, which were brought in the name of the union, the present litigation is a class action brought in the names of appellants individually and as representatives of all permanently replaced flight engineers who struck Eastern on June 23, 1962. The claim here is for reinstatement by Eastern and $29,090,100 damages against ALPA. The District Court dismissed the complaint for lack of subject matter jurisdiction and, alternatively, as barred by *res judicata*. We find the claim barred by *res judicata*, consequently we do not reach the other basis for dismissal below.

[1] *See Flight Engineers International Ass'n v. Eastern Air Lines, Inc.*, S.D. N.Y., 243 F.Supp. 701 (1965), *affirmed*, 2 Cir., 359 F.2d 303 (1966).

[2] For a chronicle of the various proceedings which preceded the instant litigation, *see Flight Engineers Int. Ass'n, EAL Chapter v. Eastern Air Lines, Inc.*, 2 Cir., 359 F.2d 303, 306-307 (1966).

In our judgment the Second Circuit's decision in *Flight Engineers Int. Ass'n, EAL Chapter v. Eastern Air Lines, Inc.*, 359 F.2d 303 (1966), which affirmed the District Court's grant of summary judgment in favor of Eastern and ALPA for "lack of jurisdiction over the subject matter," adjudicated the same claims which appellants now seek to raise before this court. Since, in our view, the suit is also between the same parties and seeks the same remedies, principles of *res judicata* foreclose our consideration of these claims. The questions whether the two suits involve the same parties or their privies and the same cause of action are but two sides of the same coin. Nevertheless we shall try to analyze them as separate issues.

Same Cause of Action.

Stripped of nonessential allegations, the original complaint and the amended complaint in this case allege a conspiracy between ALPA and Eastern to force FEIA to strike so that ALPA members could take the flight engineers' jobs. In the amended complaint the charge of conspiracy as to Eastern was tempered to some extent, but the allegations of wrongdoing and bad faith remain essentially the same. These are the same allegations of wrongdoing which appellants made in their complaint before the Second Circuit. Paragraph 51 of the complaint there alleged that

> "the unlawful refusal of Eastern to reinstate the Flight Engineers to their employment

> [has] caused plaintiff and the members represented by it, damage in the amount of $11,500,000 for back wages and other fringe benefits."

Paragraphs 52, 57, 58 and 63 charged that Eastern and ALPA provoked appellants to strike for the purpose of obtaining their jobs. Paragraph 56 charged a conspiracy between Eastern and ALPA to confer appellants' jobs on ALPA pilots. The New York complaint also prayed for the same remedies sought here:

> "(4) Issue a mandatory injunction against Eastern ordering and directing it to offer to the striking flight engineers reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers * * *."

And, as in the suit here, it asked for huge damages covering back pay and fringe benefits.

Thus the cause of action relied on in the Second Circuit litigation and the one here are identical. The remedy requested is also identical. True the identical words have not been used. The complaints were prepared by different lawyers. But essentially they are the same. What difference exists is in form, and we have long held that in determining *res judicata*

it is the substance of the action that counts. "What is important and determinative now as to the identity of causes of action, is not identity of form, but of grounds." *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 5 Cir., 109 F.2d 623, 627, *cert. denied*, 310 U.S. 653 (1940).

In deciding whether the substances of two actions are for *res judicata* purposes the same, various tests have been advanced: Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments? *See* 1B J. W. Moore, Federal Practice ¶ 0.410[1], pp. 1157-1158 (2d ed. 1965), and cases there cited. Under any of these tests the cause of action in suit here is identical with the cause of action alleged in the New York complaint. There may be some difference in the legal theory supporting the actions, but the substance, for *res judicata* purposes at least, is the same. *See Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 5 Cir., 295 F.2d 362 (1961).

Appellants deny that the cause of action here was included in the Second Circuit litigation, arguing that "the second New York proceeding rested wholly upon a cause of action asserting institutional, or recognitional, claims by the plaintiff union there, FEIA as a statutory collective bargaining organization; and that, that said proceeding in no way presented plaintiffs' *individual rights*, asserted here, against

ALPA's hostile and invidious discrimination against plaintiffs individually—not FEIA, and abuse by ALPA of its statutory bargaining franchise and power." (Emphasis in appellants' brief.)

It may be true that the New York proceeding covered institutional claims by FEIA as a collective bargaining agent, but the Second Circuit treated it as also including, as it obviously did, individual claims for reinstatement of its members and back pay. Certainly those claims are the same claims being made here, and the alleged bases for those claims are identical with the bases alleged in the New York proceeding. Under the plain allegations of the two complaints, other than Chinese copies it would be difficult indeed to find causes of action and claims for relief more similar than those asserted in the New York action and those asserted here.

The Same Parties or Their Privies.

In all the prior proceedings the plaintiff was FEIA, an unincorporated association, suing for itself and its members who lost their jobs at Eastern, whereas this is a class action with appellants, members of FEIA, suing individually and for the other members of FEIA who lost their jobs. Thus in effect we have two class actions and the members of the classes are identical. Or as the District Court here held: "In sum, the FEIA was composed of the class which plaintiffs seek to represent; as an unincorporated association, it was no more nor no less than the class itself."

Indeed, even if the second action were not a class action, the individuals actually represented by FEIA would be bound by the first action to the extent their interests were there represented. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *System Federation No. 91 v. Reed*, 6 Cir., 180 F.2d 991 (1950); *Ingersoll v. Brotherhood of Locomotive Engineers*, N.D. Ohio, 192 F.Supp. 669 (1961), *reversed on other grounds*, 6 Cir., 307 F.2d 257 (1962); *Schatte v. International Alliance, etc.*, S.D. Cal., 84 F.Supp. 669 (1949), *affirmed*, 9 Cir., 182 F.2d 158, *cert. denied*, 340 U.S. 827 (1950); 2 W. Barron & A. Holtzoff, Federal Practice and Procedure §§ 562, 563, 572 (Wright ed. 1961 and 1967 Pocket Part). The question then is whether the interests of the individual members of FEIA were raised before and, for *res judicata* purposes, resolved by the Second Circuit.

As we have seen, FEIA did try to present the claims of its individual members, and appellants virtually concede as much. They argue, however, that FEIA was not the proper party to make those claims. To make the argument they rely on language in the opinion of the District Court in the Second Circuit case that the remedy of reinstatement and damages for wrongful discharge "is available only to the individual employees and not to FEIA" and that FEIA was asking for "global damages for alleged wrong to it and not individual damages for such of its members who may have been wrongfully discharged." 243 F.Supp. at 707.

But this language in the District Court's opinion finds no counterpart in the decision of the Court of Appeals. In that court FEIA's claim was limited almost exclusively to the individual rights of the strikers, and the Second Circuit in no way suggested a lack of standing by FEIA to present these individual claims. In fact, it met the reinstatement and damages issues directly, ruling that the striking flight engineers, appellants here, could not be reinstated or awarded damages in the form of back pay without unlawfully attacking the National Mediation Board's certification of ALPA—a matter beyond the court's jurisdiction. "The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies 'in the teeth of the board's certification' of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the board's certification of that union. * * * The claim for money damages would have a similar effect." *Flight Engineers v. Eastern, supra,* 359 F.2d at 307-308.

There is, then, no question that the Second Circuit considered the claims raised by FEIA in behalf of its individual members and dismissed them for lack of jurisdiction over the subject matter. The only remaining question is whether a jurisdictional decision of this sort is *res judicata* for purposes of the present litigation in this court.

Res Judicata Effect of Jurisdictional Decision.

The doctrine of *res judicata* provides generally that, if a previous judgment is valid, final, and on the merits, it is an absolute bar in another case on the same cause of action between the same parties and their privies "not only in respect of every matter which was actually offered and received to sustain the demand or to make out a defense, but also as to every ground of recovery or defense which might have been presented." *Mendez v. Bowie,* 1 Cir., 118 F.2d 435, 440, *cert. denied,* 314 U.S. 639 (1941); 1B J. W. Moore, Federal Practice ¶ 0.405[3] (2d ed. 1965).

It is sometimes asserted that a decision has *res judicata* effect only if it is on the merits. But this overstates the case, for as the Supreme Court has said, "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *American Surety Co. v. Baldwin,* 287 U.S. 156, 166 (1932). *See also Estevez v. Nabers,* 5 Cir., 219 F.2d 321 (1955). It is true that the *res judicata* effect of a jurisdictional decision is more limited than its effect where the decision is on the merits, for it is not binding as to all matters which *could have been raised.* But a non-merits judgment of this type, whether its abating effect be termed direct estoppel (Restatement, Judgments § 49 (1942)) or simply *res judicata, is* conclusive as to matters *actually* adjudged. *Estevez v. Nabers, supra;* 1B J. W. Moore, *supra,* ¶ 0.405[5]. And it is immaterial that the non-

merits judgment may have been erroneous. *Estevez v. Nabers, supra; Catholic Society of Religious & Literary Education v. Madison County,* 4 Cir., 74 F.2d 848 (1935). The question, then, is what did the Second Circuit decide.

The Second Circuit's decision that it lacked subject matter jurisdiction was not based on factors peculiar to that Circuit. Rather it decided that once the National Mediation Board had certified ALPA, federal courts generally were without jurisdiction to consider the sorts of claims for judicial relief (reinstatement and damages) which FEIA made for its individual members in its amended complaint. It said:

> "To grant the judicial relief requested in FEIA's wholesale attack on the replacement of the strikers would directly affect the previous determination of the representational dispute by the National Mediation Board; would reopen a controversy which has plagued the airlines for years and which has been fought to a rough conclusion by resort to the self-help envisaged by the act; and would lay down a precedent that would mean the inordinate protraction of comparable struggles in years to come. For these reasons, we do not feel that courts should consider the claims for judicial relief in FEIA's amended complaint which are directly connected with the replacement of the strikers." (Footnote omitted.) 359 F.2d at 309.

This reasoning applies equally where, as here, the identical suit is brought directly by the individual members as it does where it is brought in their behalf by FEIA. Since the Second Circuit treated the individual claims as effectively raised by the union, we are bound by its dismissal of them for lack of subject matter jurisdiction. Accordingly we affirm the dismissal of this action by the District Court on *res judicata* grounds.

AFFIRMED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 94

JOHN A. ACREE, *et al.*,

Petitioners,

versus

AIR LINE PILOTS ASSOCIATION and EASTERN AIR LINES, INC.,

Respondents.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1430

JOHN A. ACREE, *et al.*,

Petitioners,

versus

AIR LINE PILOTS ASSOCIATION and EASTERN AIR LINES, INC.,

Respondents.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Case

The petition for writ of certiorari, seeking review of the judgment of the Court of Appeals for the Fifth Circuit which affirmed the District Court's dismissal of the complaint, represents the latest step (and the only still pending step) in a long and involved series of judicial and administrative proceedings arising out of a strike by petitioners (hereinafter called plaintiffs) and the other flight engineer employees of respondent Eastern Air Lines, Inc. (Eastern) in the summer of 1962.[1]

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[1] *Flight Engineers, EAL Chapter* v. *Eastern Air Lines, Inc.*, 208 F. Supp. 182 (S.D.N.Y. 1962), *affirmed per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); and the four opinions in Civil Action No. 2900 in the Southern District of New York in which both Eastern and ALPA were defendants: *Flight*

The named plaintiffs brought this action as a class action on behalf of all persons employed by Eastern on June 22, 1962 in the classification of flight engineers. (Paragraph 1 of Complaint, R. 1-2). Plaintiffs alleged a conspiracy between defendants (respondents) Eastern and the Air Line Pilots Association (ALPA) to "oust plaintiffs from their jobs and careers as professional Flight Engineers, and to replace them with unemployed members of ALPA, in order to insure ALPA members against present and future unemployment." (Paragraph 39 of Complaint; R. 16). Plaintiffs alleged that the conspiracy was to be effected by either (a) forcing the flight engineers to agree to accept pilot qualifications which would enable ALPA to call for a "mixed" representation election where the numerical strength of ALPA members would enable them to oust the then-certified representative of the flight engineers, Flight Engineers International Association, EAL Chapter (FEIA), or (b) provoking or forcing plaintiffs into a strike, whereupon Eastern would replace plaintiffs with unemployed members of ALPA. (Paragraphs 39-60 of Complaint; R. 16-22). Plaintiffs further alleged that the conspiracy was successful in that they were provoked into a strike and were replaced. (Paragraphs 63-64 of Complaint, R. 23). According to the plaintiffs, these alleged

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Engineers v. *Eastern*, 45 CCH Labor Cases 17,814 (S.D.N.Y. 1962), *affirmed*, 311 F. 2d 745 (2d Cir. 1962), *cert. denied*, 373 U.S. 924 (1963); 243 F. Supp. 701 (S.D.N.Y. 1965), *affirmed*, 359 F. 2d 303 (2d Cir. 1966); *Flight Engineers* v. *Civil Aeronautics Board*, 332 F. 2d 312 (D.C. Cir. 1964); *Flight Engineers, EAL Chapter* v. *NMB*, 338 F. 2d 280 (D.C. Cir. 1964).

The opinion of the United States District Court for the Southern District of New York in *Flight Engineers* v. *Eastern Air Lines, Inc.*, 243 F. Supp. 701 (S.D.N.Y. 1965) sets forth the long history of this labor dispute from 1957 through September 11, 1964. The Second Circuit in *Flight Engineers* v. *Eastern Air Lines, Inc.*, 359 F. 2d 303 (1966) detailed the long series of court proceedings and proceedings before the Civil Aeronautics Board and the National Mediation Board that followed the strike.

acts constituted "hostile, invidious and unlawful discrimination." (Paragraph 77 of the Complaint; R. 26-27).

For relief the plaintiffs requested (a) judgment against ALPA in the total amount of $29,090,100; (b) reinstatement of plaintiffs to their employment by Eastern; (c) an injunction restraining defendants from engaging in any further acts of hostile discrimination against plaintiffs; and (d) a declaration that the past conduct of defendants was unlawful.

Eastern and ALPA filed motions to dismiss the complaint (R. 205 and 242) and on January 25, 1967, after considering briefs and oral argument, the District Court granted such motions and entered judgment for defendants Eastern and ALPA (R. 416-422).

After oral argument on the motions to dismiss and shortly before the District Court granted those motions, plaintiffs filed an amendment (R. 391-402) of the complaint which purported to change the "conspiracy" theory to one predicated on "economic coercion and threats of reprisal" (R. 394) by ALPA which forced Eastern to yield to ALPA's demands. Since plaintiffs alleged that ALPA's "threats" and Eastern's "acquiescence" produced the same allegedly unlawful result which ensued from the "conspiracy", the gist of the action was not changed by the proffered amendment.

The judgment of the District Court was on the grounds that (1) the Court had no jurisdiction—following the decision of the Second Circuit in *Flight Engineers* v. *Eastern*, 359 F. 2d 303 (1966) on this point, and (2) this decision by the Second Circuit constituted *res judicata* on the issues raised by the instant complaint.

On appeal the Fifth Circuit affirmed the second point and did not reach the first point. The Fifth Circuit reasoned

that the same cause of action was involved in both the New York case and the instant case and that the plaintiffs in both actions were either identical or in privity.

Questions Presented

Eastern believes that the questions raised by the petition for writ of certiorari are:

(1) Are plaintiffs bound by *res judicata* by reason of the prior proceedings initiated by their collective bargaining representative (FEIA) in which the same requests for relief and the same issues were presented and decided by other tribunals contrary to the contentions of plaintiffs?

(2) Did the District Court have jurisdiction to decide issues which directly involve "jurisdictional and representation disputes" within the exclusive jurisdiction of the National Mediation Board and which, if decided by the Court as plaintiffs request, would result in a collateral attack on, and nullification of, that Board's certification of ALPA as the collective bargaining representative of Eastern's employees?

Summary of Argument

(1) This action is barred by *res judicata*. Plaintiffs, through their collective bargaining representative (FEIA), litigated essentially the same issues (alleged "conspiracy" and other unlawful conduct by ALPA and Eastern resulting in alleged unlawful discharge of Eastern's flight engineers) and sought the same relief (reinstatement of the flight engineers and damages for loss of wages) in the Federal courts in New York. The same individuals may

not relitigate the same issues and demand the same relief in this action simply by utilizing a different representative in a "class action".

(2) In any event, the principles which impelled the Federal courts in New York to dismiss FEIA's action require dismissal of this action also. Either reinstatement of the 500 striking flight engineers or award of the enormous damages which they sought would fly "in the teeth" of the National Mediation Board's certification of ALPA as the representative of Eastern's flight engineers after the strike. There is no merit in the contention of plaintiffs that the doctrine of *Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952) applies to this case to take it out of the exclusive jurisdiction of the National Mediation Board over representational disputes.

(3) Plaintiffs have set forth none of the traditional "considerations governing review on certiorari" as spelled out in this Court's Rule 19. There is no "conflict" between the Fifth Circuit decision on *res judicata* and any decision of this Court or any Court of Appeals, and there is no other basis for the grant of the writ in this case.

Argument

I. *This Action Is Barred By Res Judicata.*

The allegations of the plaintiffs, which can be summarized as claiming an unlawful conspiracy between Eastern and ALPA, or economic coercion and threats of reprisal by ALPA to which Eastern unlawfully capitulated, and other unlawful conduct by Eastern and ALPA and subsequent bad faith dealing with plaintiffs' representative by Eastern, have been before the Federal Courts a number

of times. Each time the decision has been that there was no conspiracy or other unlawful conduct and that Eastern did not deal with the FEIA in bad faith. In addition these decisions have conclusively held that the courts have no jurisdiction over the subject matter. (See cases cited in Footnote 1).

It is Eastern's contention, and the courts below concluded, that these decisions, particularly the decision by the Second Circuit at 359 F. 2d 303 (1966), constitute *res judicata* with respect to the allegations and requests for relief in the instant action.

The close parallel between this action and the one disposed of by the Federal Courts in New York is apparent from the following summary by the Court of Appeals for the Second Circuit:

> "In the summer of 1962 FEIA brought suit in the Southern District of New York, seeking a preliminary injunction against Eastern on the grounds that Eastern had failed to bargain as required by the Railway Labor Act, and had bargained improperly by withdrawing earlier offers to the union and by writing to the individual employees. The district court denied the relief requested on the grounds that FEIA had shown no clear and convincing evidence of unfair labor practices and had not demonstrated a reasonable probability of success after trial. This court affirmed on the opinion below. 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U. S. 945 (1963).
>
> "FEIA started the present suit against Eastern and ALPA in the Southern District of New York on August 21, 1962, requesting that the defendants be preliminarily enjoined from alleged violations of the Railway

Labor Act. The district court found on the merits that the procedures for bargaining under the Act had been exhausted so that the parties were free to resort to economic self-help; that Eastern had bargained in good faith with FEIA, and that Eastern had not conspired with ALPA against FEIA. The court denied the request for a preliminary injunction on the grounds that FEIA had not shown a reasonable chance of success at a full trial. 45 CCH Lab. Cas. Paragraph 17,814 (1962). This court affirmed on the ground that since the case involved problems of representation and problems of jurisdiction between labor unions, the district court was without jurisdiction to grant the relief which the plaintiff sought. 311 F. 2d 745 (2d Cir.), *cert. denied*, 373 U. S. 924 (1963). In February 1964 FEIA filed an amended or supplemental complaint against Eastern and ALPA, requesting not only an injunction against Eastern ordering it to recognize FEIA as the exclusive bargaining representative of the flight engineers, but also a declaratory judgment declaring that the many agreements between Eastern and ALPA (November 12, 1958, January 1, 1959, July 20, 1962, August 3, 1962, and August 6, 1962) were void and unenforceable; a mandatory injunction directing that Eastern reinstate the striking FEIA flight engineers without prejudice, 'ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers'; and a judgment for damages of $11,500,000, together with a similar sum 'as exemplary damages.'

"Both defendants moved for summary judgment dismissing the amended complaint on the ground that the court was without jurisdiction to grant the relief requested. The district court granted the defendants' mo-

tions, partly on the ground that there was no evidence of violations of the act and partly on the ground that the district court lacked jurisdiction of the subject matter. 243 F. Supp. 701 (S. D. N. Y. 1965)."

The plaintiffs in their petition for certiorari do not contend that the District Court in the instant case was incorrect in stating:

> "The basis of the plaintiffs' complaint is that the defendants conspired to discharge them and that such discharge was wrongful.
>
> "This complaint was dealt with and determined to be without merit in several decisions by the federal judiciary. See *FEIA, EAL Chapter* v. *Eastern Air Lines*, 208 F. Supp. 182 (1962), *aff'd. per curiam* 307 F. 2d 510 (1962), *cert. den.* 372 U.S. 945 (1963); *FEIA* v. *Eastern Air Lines, Inc.*, 243 F. Supp. 701 (1965), *aff'd* 359 F. 2d 303 (1966). . . ."

Likewise, plaintiffs do not take issue with the Fifth Circuit's conclusion that:

> "Thus the cause of action relied on in the Second Circuit litigation and the one here are identical. The remedy requested is also identical. True the identical words have not been used. The complaints were prepared by different lawyers. But essentially they are the same. What difference exists is in form, and we have long held that in determining *res judicata* it is the substance of the action that counts. 'What is important and determinative now as to the identity of causes of action, is not identity of form, but of grounds.' *Wilson Cypress Co.* v. *Atlantic Coast Line R. Co.*, 5 Cir., 109 F. 2d 623, 627, *cert. denied*, 310 U.S. 653 (1940). . . ."

> ". . . Under the plain allegations of the two complaints, other than Chinese copies it would be difficult to find causes of action and claims for relief more similar than those asserted in the New York action and those asserted here."

Rather, the plaintiffs contend that despite the fact that the factual allegations are the same and the requests for relief are the same, *res judicata* does not apply because there was no privity between the plaintiffs in the New York actions and the plaintiffs in the Georgia action.

Plaintiffs assert (1) that the individual plaintiffs were not parties to the New York litigation and (2) that the only issues in the New York litigation related to FEIA *as FEIA*. As can be plainly seen from the decision of the Court of Appeals for the Second Circuit, these contentions of plaintiffs are incorrect. The fact is that the Court of Appeals assumed that FEIA was the representative of all individual flight engineer strikers and had standing to seek, and was seeking, reinstatement and damages for them. That Court further specifically ruled that such individuals *could not* be *reinstated* or *awarded damages* without unlawfully attacking the Mediation Board's certification of ALPA—a matter beyond the Court's jurisdiction.

The identity of parties (FEIA and the individual striking flight engineers) is apparent. Under the Railway Labor Act, all dealings are between the "carrier or carriers and its or their employees" through their "representatives designated and authorized". See Section 2, Second, Third, and Fourth and other provisions throughout the Railway Labor Act, 45 U.S.C. 151 *et seq.* Thus, whenever FEIA spoke, it necessarily spoke for the individual members of the union. In its amended New York complaint it alleged (paragraph 2) that it was "a voluntary unincorporated

labor organization duly certified, designated and authorized under the Act as the collective bargaining representative of all employees of defendant Eastern Air Lines, Inc. in the class or craft of Flight Engineers." Such an unincorporated association *is* the members thereof and the members *are* the association. Without them there would be no union. Clearly FEIA sued only as "the collective bargaining representative" of plaintiffs and the other striking flight engineers.

When the case reached the Court of Appeals, FEIA in effect abandoned all claims of the union *qua* union saying (page 23 of its Brief):

> "However, at issue now are the employment rights of some 500 flight engineers who, EAL Chapter claims, have been wrongfully discharged from employment and discriminatorily refused reinstatement by Eastern for reasons quite apart from those before the Court in the prior appeal. The court may leave undisturbed the prior decision, and yet grant the relief requested by EAL Chapter to remedy the wrongs committed against the 500 individuals who now seek reinstatement. The prior appeal had nothing whatsoever to do with the reemployment rights of these individuals, and the opinion of this Court on that appeal does not, indeed it cannot, foreclose the presentation of these new claims. For if it were otherwise, these 500 individuals represented by their certified bargaining agent would be without any remedy whatsoever, a result impossible to square with our jurisprudential system."

It should be noted in this connection that the plaintiff in the New York actions was the Flight Engineers International Association, *EAL Chapter*, an organization composed solely of, limited to and controlled by flight engineer

employees of Eastern—precisely the same class that brought this action.

In the New York litigation FEIA did not seek to vindicate "institutional rights" of the union. The FEIA contended (1) that the individual flight engineers had a right to be represented by the union of their choice and that the flight engineer employees had chosen the FEIA; and (2) that the individual employees had a right to reinstatement and damages for lost compensation and that they could wage their battle jointly through their representative. Such representation—giving the individual employees additional strength through joint representation and action—is one of the basic purposes for which unions exist.

It is true that actions for wrongful discharge—in their Railway Labor Act connotation—are normally brought by the individual rather than any collective bargaining representative. But these are actions brought under state law and are based on the premise that the individual has accepted the fact that his employment has terminated. *Koppal* v. *Transcontinental & Western Air, Inc.*, 345 U.S. 653 (1953); *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941). Acceptance of discharge is also acceptance of the fact that the individual is no longer represented by the collective bargaining representative and is no longer a part of the class represented by the bargaining agent.

This is in sharp contrast with both the New York actions and the instant action. In both actions the plaintiffs sought reinstatement of the flight engineers that had been replaced—which takes both actions out of the wrongful discharge category as it is known under the Railway Labor Act. Both actions were brought under federal rather than state law. Thus, both actions are clearly of the type in which traditionally the collective bargaining agent has represented the class.

This is not to say that the collective bargaining agent is the sole party that may represent the class. It is only to say that the collective bargaining agent is a proper party to represent the class. The class may decide to use its collective bargaining agent or to use named individual representatives, but it cannot do both.

From the above, it is evident that plaintiffs err when they say (petition page 15, and generally pages 12-17) ". . . the thrust of FEIA's said prior litigation was essentially directed solely to the end of protecting FEIA's claimed institutional recognitional rights. . . ." [2]

For even further demonstration that FEIA was presenting the individual reinstatement claims of the strikers, see pages 42-54 of FEIA's Brief to the Second Circuit as reproduced in the record of this case (R. 380-391).

In short, by the time the New York litigation reached the Second Circuit for final decision in early 1966, the principal issue—if not the only one—was the very issue which plaintiffs now urge upon this Court, *i.e.*, the claim that the individual strikers were entitled to reinstatement and damages because their jobs had been unlawfully seized as a result of ALPA's "raid" and Eastern's acquiescence in ALPA's "crew complement" demand.

Plaintiffs rely on statements by the New York District Court that the remedy of reinstatement and damages for wrongful discharge "is available only to the individual employees and not to FEIA" and that "FEIA is seeking global damages for alleged wrong to it, and not individual

[2] Plaintiffs also argue that this is shown by the failure of the FEIA to rely on *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944) and *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). A more logical explanation of the FEIA's failure to cite and rely on these cases is that they were deemed inapplicable—as we shall demonstrate they are. (See Part II of this Brief).

damages for such of its members who may have been wrongfully discharged." Three further comments are sufficient:

(1) By the time the case reached the Second Circuit, FEIA's claim was almost exclusively limited to the individual rights of the strikers, as demonstrated above.

(2) The Second Circuit did not suggest a lack of standing by FEIA to present the individual claims, but met the reinstatement and damages issues head on as being presented properly by plaintiffs' representative.

(3) After making the preliminary statement quoted by plaintiffs, the District Court held:

> "Moreover, any action for wrongful discharge must be founded on a violation of the Act or of an agreement entered into under the Act in force at the time the discharge occurred. There was of course the agreement between Eastern and FEIA, dated December 31, 1958, as to which both sides served notices of modification in 1960. The events from that time until the strike on June 23, 1962 have already been recited. For the reasons cogently stated by Judge Feinberg and Judge Levet, once the strike had been called and paralyzed the operations of Eastern, the agreement was no longer in force and Eastern was entitled to take unilateral action or self-help in order to restore the vital public service of its air line. As stated by Judge Levet:
>
> > 'Based on the record before me, I find for the same reasons as did Judge Feinberg, that as between the plaintiff [FEIA] and Eastern the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help.'
>
> "Judge Feinberg stated that under the circumstances Eastern could hire and train co-pilots to replace the

strikers and, in so doing, it did not exceed the boundaries of lawful 'self-help.' *Flight Engineers* v. *Eastern Air Lines, Inc.*, 208 F. Supp. at 194. Moreover, the Mediation Board in its brief to the Court of Appeals for the District of Columbia, in *Flight Engineers Int'l Ass'n, EAL Chapter* v. *National Mediation Board*, 338 F. 2d 280, stated, at p. 32,

> 'The Board determined that FEIA's strike against Eastern was an economic strike and that Eastern therefore had a right to permanently replace these strikers . . . *Cf. NLRB* v. *McKay Radio & Tel. Co.*, 304 U. S. 333.' "

The only difference between the instant case and the prior cases is that the instant action is brought by five individuals as representatives of the class rather than by the FEIA as the representative of this same class. Both FEIA and plaintiffs have claimed to represent all of Eastern's flight engineer employees. The net effect is that the same group of claimants (Eastern's former flight engineers) is making the same claims (alleged violations of the Railway Labor Act) and seeking the same relief (reinstatement, injunction and damages). Only the nominal representative of the group, the counsel of record and the forum have been changed. It is settled law that where one representative of a class brings an action the result is *res judicata* as to all members of the class. In *Hansberry* v. *Lee*, 311 U. S. 32 (1940) this Court said:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present

> as parties . . . or where the interest of the members of the class, some of whom are present as parties is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. . . ."

See also *King* v. *International Union of Operating Engineers*, 250 P. 2d 11 (Calif. District Court of Appeals, 1952).

In *Hixon* v. *Kansas City*, 239 S. W. 2d 341 (Sup. Ct. Mo. 1951) the court pointed out that *res judicata* operates even though the parties are not the same in the second case, where the interest represented in both suits is identical. The Court held:

> "Respondents contend that the Taylor case is not res adjudicata in this case because different parties are involved. They make this contention for the reason that the class represented by the intervenors in that case was limited to residents of the Clay County area while the class represented in this case resides both in Clay and Jackson County . . .
>
> ". . . Under similar circumstances we held that the rule of 'privities' of parties applied and that the parties in the second suit whose interests were the same as the parties to the first suit were bound by the judgment of the first suit in the case of *Drainage District No. 1 Reformed* v. *Mathews, Mo. Supp.*, 234 S. W. 2d 567, loc. cit. 574. In ruling that case we said:
>
> 'The doctrine [res adjudicata] is applicable if (as here) the interest of the represented and the representatives are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them. The rule of

> *Powell* v. *City of Joplin,* supra. [335 No. 562, 73 S. W. 2d 408], is not opposed to the fundamental principle that a stranger to a cause and to its subject matter is not bound by a judgment as to which he had no opportunity to be heard. But in the instant circumstances under the applicable principles and the broad policy of the law to bring litigation to an end the res judicata rule must be applied. And under the principles of that rule "privity" depends more upon the relation of the parties to the subject matter than upon their connection as parties with or any activity in the former litigation. Generally speaking, privies are those legally represented at the trial. Privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right; and where this identity of interest is found to exist, all are alike concluded and bound by the judgment . . .'"

Obviously the interest of the FEIA in prosecuting the prior suits is identical with the interest of the named parties and class in the instant suit. In the prior proceedings, as in the instant proceedings, reinstatement of the members of the class and damages for their termination were demanded. The identical benefit would have flowed to the members of the class had the FEIA been successful as would flow to the same class if the instant plaintiffs were successful. Substantially identical charges of wrongdoing were brought by the FEIA in the prior suits as are set out in the instant action.

Nor does the fact that the Second Circuit's decisions were based on lack of jurisdiction over the subject matter detract from the binding effect of the decisions. In *Estevez* v. *Nabers,* 219 F. 2d 321 (1955) the Fifth Circuit held:

"The first action having held the complaint was defective in failing to allege a controversy of a justiciable nature, a jurisdictional requirement under Article III of the Constitution, we may not consider the correctness of that decision on the facts there alleged . . .

"Plaintiff insists that the first judgment was not 'on the merits' and should not bar this subsequent action. The dismissal of the first action can be ascribed to a lack of jurisdiction or to the absence of a substantive claim; actually the ground of dismissal amounted to both of these. But even if regarded as a decision not on the merits, the first action precludes a new adjudication of the question actually decided, although it does not 'bar the cause of action . . .' The Restatement calls this effect of a non-merits judgment 'direct estoppel.' Restatement, Judgments Section 49, Comment b. This terminological distinction seems valuable to show that such a judgment does not bar the cause of action. But whether the first decision was on the merits or not is not important here, since we regard the two actions as not materially different, and the questions actually decided in the first action disposes of the present one as well."

See also *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); *Catholic Society, Etc.* v. *Madison County*, 74 F. 2d 848 (4th Cir. 1935).

Thus, it is clear that prior court decisions, involving this identical dispute and the same parties in interest, have held that the courts lack jurisdiction to grant reinstatement and damages and on the merits have held that there was no unlawful conduct by ALPA and Eastern. These decisions are *res judicata* and this action was properly dismissed.

II. *The District Court Lacked Jurisdiction Of the Subject Matter Of This Action.*

Even if the Court were to conclude that *res judicata* should not be applied to bar this action, the decisions cited and quoted above would require the conclusion that the District Court lacked jurisdiction of the subject matter for the same reasons that the FEIA action in the New York Federal courts was dismissed.

Here, as in the New York action, much of the complaint relates to "jurisdictional and representational disputes" between FEIA and ALPA—"disputes which, under the Railway Labor Act, are 'for non-curial treatment.' *FEIA* v. *Eastern Air Lines,* 311 F. 2d 745 at 748 (2d Cir.), *cert. denied,* 373 U. S. 924 (1963)."

Here, as in the New York action, the demand for reinstatement of the strikers flies "in the teeth of the board's certification" of ALPA. "Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants."

Here too, as in the New York action, "The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never care to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claims that the Railway Labor Act had been violated—a result which would clash with the evident congressional intent to have disputed questions of representation in an industry so

charged with the public interest disposed of rapidly." It is true that the damage claim in this case is directed to ALPA whereas the New York action sought damages from both defendants. However, the ultimate effect is the same since, if damages of such amounts could be obtained despite reliance on a Mediation Board certification, neither the certified union nor the employer would be willing to proceed until judicial immunity could be obtained.

The Court of Appeals for the Second Circuit clearly was on sound ground when it held that the award of damages by a court would represent an improper interference with the Mediation Board's certification function since, as the Supreme Court stated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 246-247 (1959): ". . . regulation can be as fully exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." See also *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948). It would be anomalous indeed if the Mediation Board's certification procedure, which may not be interfered with by injunctive process, or direct judicial review, could be circumvented collaterally by an award of damages against parties which rely on the Mediation Board's certification.

In short, all the reasons which impelled the Federal Courts in New York to dismiss the FEIA action apply with equal force to require dismissal of this action. Despite their disclaimer of intent to upset the certification of ALPA (Complaint Paragraph 82; R. 28), plaintiffs' demand for relief inevitably would constitute an improper collateral attack on that certification. Consequently, the District

Court lacked jurisdiction to consider the grant of such relief to plaintiffs.

Plaintiffs seek to give an aura of novelty and legitimacy to their complaint by asserting that ALPA and Eastern have engaged in "hostile, invidious, and unlawful discrimination" (*e.g.*, Complaint Paragraph 76; R. 26), with the apparent suggestion that ALPA as statutory collective bargaining representative of the plaintiffs violated a duty to represent the plaintiffs in good faith. However, this contention becomes patently spurious in light of the judicial determinations, quoted above, that all of plaintiffs had been permanently replaced by August 25, 1962, nearly two years before ALPA became the bargaining representative for flight engineer personnel.

Certainly, ALPA had no duty to represent *former* employees when it became the certified representative in June 1964. And, if plaintiffs are seeking to attack anything ALPA and Eastern did before June 1964 they are collaterally attacking the Mediation Board's certification of ALPA (contrary to their disclaimer in Paragraph 82 of the complaint) since that certification necessarily is predicated on the finding or assumption that ALPA attained majority representative status lawfully.

As appears from further court decisions, the National Mediation Board at the instance of FEIA investigated some of the charges which plaintiffs now seek to revive, and determined them adversely to plaintiffs' contentions. After investigation, the Mediation Board certificated ALPA and made clear that the charges of illegality which were leveled against Eastern and ALPA were unfounded.

The District Court and the Court of Appeals for the District of Columbia affirmed the Mediation Board's action

on the ground that the Mediation Board had complied with its statutory duty to "investigate" and was not required to grant FEIA the full-dress hearing which it had demanded. As the Court of Appeals stated (*Flight Engineers* v. *National Mediation Board,* 338 F. 2d 280 (D. C. Cir. 1964)):

> "As to appellant's contention based on our statement in *Flight Engineers' Int'l Ass'n* v. *CAB,* —— U. S. App. D. C. ——, 332 F. 2d 312, 316 (1964), that to the extent that the replacement issue related to eligibility of participants in the election, it could and properly should be determined by the Board, the record shows that the Board did investigate, hold hearings upon, and determine, the issue of eligibility, including a ruling on replacements. This was done in a manner which, under the limited character of our review, escapes judicial revision."

Moreover, in making charges of conspiracy and discrimination against ALPA and Eastern, plaintiffs are attempting to relitigate the very issues which were determined by the New York Federal Courts against them in the action brought by their representative, FEIA. For reasons stated in the first part of this brief, we submit that plaintiffs may not relitigate such issues.

Plaintiffs predicate their claim that the District Court had jurisdiction on the line of cases beginning with *Steele* v. *Louisville & Nashville R.R.,* 323 U. S. 192 (1944) and *Tunstall* v. *Locomotive Firemen and Enginemen,* 323 U. S. 210 (1944) which hold that a certified bargaining representative under the Railway Labor Act cannot misuse its power as *exclusive* representative of the employees in the class or craft by "hostile discrimination" against a minority

group (non-members of the union and, in virtually all cases, Negroes who are ineligible for membership in the union) of the *employees whom the union is required to represent.* Plaintiffs can not seriously believe that the principle of the *Steele* and *Tunstall* cases supports their action, since they are forced to admit that they were not at any time represented by ALPA, but they were, on the contrary, represented at all times by FEIA.

Since their case plainly does not fit *Steele* and *Tunstall,* plaintiffs are forced to rely on the unique rule of *Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952) which held that a large and strong union of white employees could not lawfully seize the jobs of Negro employees *performing the same job functions* (although classified under a different job title and represented by a separate Negro union) because such seizure was based *solely* on *race* and, however well qualified the Negro employees might be, "their color alone would disqualify them for the old job under its new name." The Court there concluded that "discriminations based on race alone are obviously irrelevant and invidious" and that Congress did not give the white union monopoly power in order to accomplish such a discrimination based solely on race.

While, as plaintiffs point out, *Steele* and *Tunstall* have been extended to cases involving discrimination on grounds other than race, *Howard* has not been so extended and it is *sui generis.* Whether *Howard* could be extended to other factual situations is questionable. In any event, it could not properly be extended to this case for the following among other reasons:

(1) In *Howard,* the Negro employees had the same job qualifications as the employees who took their jobs—the *only* difference was one of color which did not affect ability

to do the job. Here, there were substantial differences in job qualifications (pilot *versus* mechanic skills) and a genuine difference of opinion between the two unions as to which group was better qualified. Regardless of which union was right (and numerous Emergency Boards and Commissions appointed by the President concluded after study that pilot qualifications were preferable), the outcome was not based on considerations which were "obviously irrelevant and invidious."

(2) In *Howard*, the Negro employees had no opportunity to retain their jobs—their color alone prevented their employment and color could not be changed. Here, while job qualification requirements were changed as to jet aircraft, plaintiffs were given repeated opportunities to obtain such qualifications and retain their jobs on jets, and they had the further opportunity to retain their jobs on propeller aircraft without even obtaining pilot training. More than 100 of plaintiffs' fellow strikers took advantage of these opportunities by returning to work for Eastern and they have retained their jobs with preferential seniority rights. Plaintiffs spurned these opportunities and the loss of their jobs is therefore attributable to their own action, not that of Eastern or ALPA.

(3) In *Howard*, the Negro employees lost their jobs through a contract signed by the employer and another union without their consent and without any action on their part which contributed to the result. Here, plaintiffs lost their jobs solely because they went on strike, refused to return despite repeated urging by Eastern, the Secretary of Labor, other governmental officials and the President himself, and thus forced Eastern to replace them. By leaving their employment and causing themselves to be permanently replaced as a result of their strike and refusal

to return, plaintiffs have lost any right they might otherwise have to complain as to the new job qualifications established on jet aircraft.

(4) In this case, contrary to the situation in *Howard*, the claimed rights of plaintiffs have become an integral part of a jurisdictional dispute which has been litigated and relitigated before the National Mediation Board and the courts and, as conclusively held by the Court of Appeals for the Second Circuit, any effort to obtain reinstatement for plaintiffs amounts to an attack on the Mediation Board's certification of ALPA—a matter which is beyond the Court's jurisdiction.

(5) In this case, contrary to the situation in *Howard*, the claims of plaintiffs have been presented on their behalf by their collective bargaining representatives and have been conclusively decided contrary to their contentions.

(6) It is inconceivable that the principle of *Howard* would be extended to this type of economic battle between two unions over job jurisdiction. Such jurisdictional disputes are commonplace, as is generally known (*e.g.*, the construction industry), and as Congress has recognized in providing for resolution thereof under certain circumstances by the National Labor Relations Board pursuant to Section 10 (k) of the National Labor Relations Act (29 U.S.C. Sections 151-168). *Cf. Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261 (1964). This Court recently has further recognized the existence of such disputes over job assignment under the Railway Labor Act and has held that the disputes are to be settled by the Adjustment Boards created pursuant to the Railway Labor Act to the extent they are not "representation disputes" subject to the exclusive jurisdiction of the National Mediation Board.

Transportation-Communication Employees Union v. *Union Pacific R.R.*, 385 U. S. 157 (1966). If, as plaintiffs apparently contend, every "raid" by one union on the work jurisdiction of another were to be deemed a violation of the *Howard* principle, then the administrative agencies created by Congress to solve such disputes would become meaningless. If, as plaintiffs claim, the District Court has jurisdiction to determine whether ALPA improperly set out to "confiscate" the jobs of plaintiffs and whether ALPA then improperly forced Eastern to yield to its demand for additional pilot qualifications in the cockpit, and if the presence of such issues gives the Court further power to set aside Eastern's contracts with ALPA and to reinstate plaintiffs despite their lack of qualifications called for by the contracts, then the *Howard* decision would supersede the Railway Labor Act and the courts would be flooded with complaints seeking adjudication of job jurisdiction claims. And, of course, any such extension of *Howard* would amount to the negation of the principles of *Slocum* v. *Delaware L. & W. R.R.*, 339 U. S. 239 (1950) and also of *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) and *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U. S. 323 (1943).

It should be observed that, although the dispute between ALPA and the representatives of flight engineers over the required skills of the latter has erupted in many lawsuits, the *Howard* principle has not been invoked at any of the other air lines as a reason why ALPA's demands and supporting activities were unlawful. See for example *Flight Engineers* v. *Western Air Lines*, 43 CCH Lab. Cas. 17,064 (S. D. Cal. 1961); *Flight Engineers* v. *Continental Air Lines*, 297 F. 2d 397 (9th Cir. 1961); *Ruby* v. *American Airlines*, 323 F. 2d 248 (2d Cir. 1963), *cert. denied*, 375

U. S. 913 (1964); and *Northwest Airlines* v. *Machinists*, 185 F. Supp. 129 (D. Minn. 1960).

As noted above, plaintiffs have cited no case—and there is no case—in which the *Howard* principle has been extended beyond the precise situation presented in *Howard*—a seizure of jobs by a powerful white union at the expense of Negro employees, and with race as the *sole* basis for the discrimination.

In *Rumbaugh* v. *Winifrede R.R.*, 331 F. 2d 530 (4th Cir. 1964), *cert. denied, sub nom. Mine Workers* v. *Rumbaugh*, 379 U.S. 929 (1964), the Court firmly refused to extend *Howard* beyond the narrow situation there presented. In *Rumbaugh*, plaintiff complained that the employer and the union had conspired unlawfully to cause his discharge and that the union thus had violated its duty of fair representation within the rule of the *Howard* case. The Court of Appeals remanded the case to the District Court to determine whether or not Rumbaugh was within the class or craft represented by the union, saying:

> "Because the duty extends only to those employees whom the union is empowered to represent and because a union cannot be expected to look after the needs and demands of workers who are not covered by the collective bargaining agreement, an employee must establish, as part of his case, that he is a member of the designated bargaining unit.
>
> "Rumbaugh maintains that the union's duty of fair representation extends even further. His theory is that when discrimination is alleged, the complainant's status relative to the bargaining unit is immaterial. As support for this contention he cites *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952). But in that case the Supreme Court rejected the proposi-

tion that *Steele's* prohibition against racial discrimination was inapplicable because the plaintiffs, train porters, were not designated as brakemen, the class of employees represented by the Brotherhood. The Court said that the central issue was the legality of the collective bargaining agreement which the white union had secured and which had the effect of requiring the carrier to eliminate all Negro train porters and substitute white brakemen in their places.

"We agree that the Court disregarded the artificial classification of train porters and brakemen in holding that the union violated its obligation of fair representation by entering into a racially discriminatory collective agreement. But this disregard was a facet of the patently illegal activity of the Brotherhood. It was the Court's view that the bargaining agent's obligation extended to all who worked in the craft, regardless of job classification. The Court did not hold that the duty of fair representation extends even to workers, such as supervisors, who are not regarded as 'employees' within the meaning of the Railway Labor Act.

"The union's position is that Rambaugh is not within the unit it represents, because he is a supervisor. It contends that exclusive jurisdiction to determine his employment classification (*i.e.*, whether he is a supervisor or a non-supervisor) lies either with the National Railroad Adjustment Board as a question arising 'out of the interpretation or application of agreements,' 45 U.S.C.A. § 153 First (i), or with the National Mediation Board as a dispute concerning craft classification or representation, 45 U.S.C.A. § 152 Ninth."

Since plaintiffs were not within the class or craft represented by ALPA and since ALPA's demands were not

based on race (or on any other factor unrelated to skills and job qualifications), the *Howard* rule does not apply and the District Court lacked jurisdiction for the reasons outlined above.

CONCLUSION

It will be observed that the petition for certiorari makes no effort to show that customary "considerations governing review on certiorari", as spelled out in this Court's Rule 19, call for grant of the writ in this case. The Fifth Circuit's decision rests solely on *res judicata;* yet the petition contains no suggestion that the decision below conflicts with a decision of this Court or any court of appeals involving *res judicata,* and certainly there is no suggestion of a departure from "the accepted and usual course of judicial proceedings."

On the point which the Fifth Circuit did *not* reach—jurisdiction to grant the requested relief—the petition seeks to demonstrate a conflict with this Court's decision in the *Howard* case. If there were a conflict, it would be with the *District* Court's decision but, as shown above, there is no conflict.

In any event, we have demonstrated in this brief (a) that all of plaintiffs' factual contentions have been thoroughly adjudicated at the instance of their authorized representative (FEIA) and they are therefore barred by *res judicata;* and (b) that even if not barred for that reason, the plaintiffs' claims for relief could not be granted for the very reasons which impelled the New York federal courts to dismiss the litigation prosecuted by FEIA.

For these reasons, the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 14[redacted] 94

JOHN A. ACREE, et al.,

Petitioners,

versus

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1430

JOHN A. ACREE, et al.,

Petitioners,

versus

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and EASTERN AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, dated February 13, 1968, not yet officially reported, is reported unofficially at 57 CCH LC ¶12,482 and 68 LRRM 2117. The opinion of the United States District Court for the Northern District of Georgia, dated January 25, 1967, has not been reported.

Jurisdiction

The judgment sought to be reviewed herein was entered on February 13, 1968. The petition for a writ of certiorari was received by counsel for respondent Air Line Pilots Association, International on May 17, 1968. Petitioners state that the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

The relevant provision of the Railway Labor Act, 45 U.S.C. §152, Ninth, is set forth in the Appendix hereto.

Questions Presented

1. Is the instant complaint on behalf of all former Eastern flight engineers barred by *res judicata* where the same claims, issues and requests for relief have previously been determined adversely to petitioners in prior litigation on behalf of all former Eastern flight engineers by FEIA, their collective bargaining representative?

2. Following National Mediation Board certification of ALPA as the collective bargaining representative for Eastern's flight engineers, do the federal Courts lack subject matter jurisdiction to decide representation matters within the scope of Section 2, Ninth of the Railway Labor Act and claims which constitute a collateral attempt to nullify ALPA's certification under the Act?

Statement of the Case

Respondent Air Line Pilots Association, International ("ALPA") is the certified collective bargaining repre-

sentative under the Railway Labor Act (the "Act"), 45 U.S.C. § 151, *et seq.*, of flight engineers employed by respondent Eastern Air Lines, Inc. ("Eastern"). ALPA also represents all other pilots employed by Eastern.

Petitioners, former Eastern flight engineers, sue here individually and on behalf of all 637 flight engineers employed by Eastern on June 22, 1962 (P.A. 1-2).* These 637 flight engineers, including the named petitioners, were, as of June 22, 1962, represented by EAL Chapter, Flight Engineers International Association ("FEIA") (89a).**

The instant complaint, allegedly based upon the Railway Labor Act, seeks injunctive relief, including an order directing Eastern to reinstate petitioners as flight engineers, a judgment declaring that respondents' conduct prior to and during the 1962 strike by petitioners against Eastern amounted to a conspiracy to deprive them of their employment, and a judgment of more than twenty-nine million dollars in compensatory and punitive damages against ALPA (P.A. 28-31).

The controversy underlying this complaint is far from a matter of first impression. It has been the subject of constant litigation for almost six years, during which judicial and administrative forums have issued numerous determinations in proceedings in which petitioners' privies were parties. In every instance, claims identical to or comprehensive of those set forth in the complaint in this action have been rejected. The following history of this dispute is based upon both the actual record herein and earlier

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* References designated "P.A." are to the multilith Appendix of Petitioners in the Court of Appeals.

** References followed by the letter "a" are to the Appendix of Respondent ALPA in the Court of Appeals.

judicial and administrative proceedings, all of which were before the Court of Appeals when it dismissed this action.*

A. Background of dispute

Federal Air Regulations require that certain large commercial aircraft be manned by at least three persons, a pilot, a copilot, and a third crew member who must possess a flight engineer's certificate issued by the Federal Aviation Administration. Since the advent of jet airline operations, ALPA has urged that the third crew member on jet aircraft should also possess pilot qualifications. This has also been the view of several Presidential Emergency Boards appointed under Section 10 of the Railway Labor Act, as well as President Kennedy's 1961 Commission ("Feinsinger Commission") on the crew complement controversy (P.A. 113-146).

FEIA, then the authorized representative for Eastern's flight engineers, took an opposite position. FEIA argued that jet flight engineers should instead be qualified, in addition to the flight engineer certificate, as licensed aircraft mechanics with so-called "A & E" or "A & P" mechanic's licenses.

In 1958, FEIA, rejecting recommendations of a Presidential Emergency Board, struck Eastern for 38 days in

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* For Federal Court decisions, see: *FEIA* v. *Eastern and ALPA*, preliminary injunction denied 45 CCH LC ¶ 17,814 (S.D.N.Y. 1962), *aff'd* on other grounds 311 F. 2d 745 (2nd Cir. 1963), *cert. den.* 373 U.S. 924 (1963); summary judgment granted 242 F. Supp. 701 (1965), *aff'd* 359 F. 2d 303 (2nd Cir. 1966); *FEIA* v. *Eastern*, 208 F. Supp. 182 (S.D.N.Y. 1962), *aff'd per curiam* 307 F. 2d 510 (2nd Cir. 1962), *cert. den.* 372 U.S. 945 (1963); *FEIA* v. *Civil Aeronautics Board*, 132 F. 2d 317 (D.C. Cir. 1964); *FEIA* v. *National Mediation Board*, 230 F. Supp. 611 (D.D.C. 1964), *aff'd* 338 F. 2d 280 (D.C. Cir. 1964); *Lind and Brunsgaard* v. *National Mediation Board*, unreported (Dist. Col. No. 1236-64, oral opinion of Judge William B. Jones, transcript pp. 67-68; *aff'd* D.C. Cir. No. 18,864-1965).

protest against a pilot qualification requirement for flight engineers on jet equipment. That strike was resolved by an agreement providing in effect for a four man jet crew consisting of two pilots, a mechanic-qualified flight engineer, and a third pilot qualified crew member. Eastern's jet aircraft were flown by a crew of four until 1962, while flight engineer strikes and repeated attempts by Presidential Commissions and Presidential Emergency Boards failed to result in any alternative solution to Eastern's crew complement problem acceptable to FEIA.

B. The 1962 FEIA strike and the replacement of the striking flight engineers.

On June 23, 1962, FEIA, after rejecting a request of President Kennedy to arbitrate its differences with Eastern, struck Eastern once again, causing the complete shutdown of the carrier's operation. That strike began two days after flight engineers on another airline, TWA, had reached a crew complement settlement based upon the Feinsinger Commission reports and similar to that proposed by Eastern (P.A. 164-175).

In mid-July 1962, after nearly a month of efforts by the federal government to settle the strike and by Eastern to secure a settlement modeled on the TWA agreement, Eastern offered to provide pilot training to the striking flight engineers in order to qualify them for occupancy of the third seat in a three man jet crew. FEIA rejected Eastern's offer and continued the strike. Eastern then made the same offer individually to each of the striking engineers, including petitioners, informing them that if they did not report to work by July 24, 1962, they would be replaced. Eastern's final offer to the striking flight engineers was made on August 10, 1962. As a result, a total of some 102 striking flight engineers returned to service and are today in Eastern's employ.

Eastern began to replace the striking flight engineers on August 10 and on August 25, it notified all of the flight engineers still on strike that they had been permanently replaced.

C. Litigation since the 1962 FEIA Strike.

1. *FEIA's actions in the federal Courts in New York.*

In the summer of 1962, FEIA, acting on behalf of the same 637 persons for whose benefit this action was brought, initially sued Eastern in the United States District Court for the Southern District of New York. The District Court, reviewing the history of the dispute in detail, denied a preliminary injunction on the grounds that FEIA had shown no convincing evidence of unfair labor practices and no reasonable chance of success upon trial. *FEIA* v. *Eastern,* 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam* 307 F. 2d 510 (2nd Cir. 1962), *cert. den.* 372 U.S. 945 (1963).

FEIA also initiated a second action in the same Court, this time against both Eastern and ALPA. In summary, FEIA alleged that Eastern and ALPA were parties to a conspiracy to defeat the rights of FEIA and the striking flight engineers (including petitioners) under the Railway Labor Act, and sought, *inter alia,* injunctive relief, reinstatement of strikers and substantial money damages. FEIA's motion for a preliminary injunction was denied with findings on the merits that the procedures under the Act had been exhausted so that the parties could resort to self-help and that Eastern had bargained in good faith. The District Court further held that "[t]he allegation of a conspiracy between the defendants is also without merit." *FEIA* v. *Eastern and ALPA,* 45 CCH LC ¶17,814 (S.D. N.Y. 1962), *aff'd* on other grounds, 311 F.2d 745 (2nd Cir. 1963), *cert. den.* 373 U.S. 924 (1963).

The first of the two New York actions having been discontinued, Eastern and ALPA moved for summary judg-

ment in the second one. The District Court decision granting these motions on the grounds of no evidence of violations of the Act and lack of subject matter jurisdiction was affirmed by the Court of Appeals. *FEIA* v. *Eastern and ALPA*, 243 F. Supp. 701 (S.D.N.Y. 1965), *aff'd* 359 F.2d 303 (2nd Cir. 1966).

2. *Representation proceedings before the National Mediation Board and resulting litigation.*

The replacements employed by Eastern to fill the positions vacated by the striking petitioners had no collective bargaining representation. To remedy that situation, ALPA, on October 4, 1963, requested that the National Mediation Board investigate and certify a representative for Eastern's flight engineers under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth.

FEIA thereafter requested the National Mediation Board to suspend processing ALPA's application. When the Board refused, FEIA sought to prevent the representation election by an action in the District Court for the District of Columbia. FEIA's motion for a preliminary injunction was denied. *FEIA* v. *National Mediation Board*, 230 F. Supp. 611 (D.D.C. 1964), *aff'd* 338 F.2d 280 (D.C. Cir. 1964).

In its brief on FEIA's appeal, the Mediation Board stated:

> "Preliminarily, we should like to reiterate just what the NMB did and what it did not do. The Mediation Board received and considered all statements, documents, and other material submitted by FEIA, as well as by Eastern and ALPA, relating to FEIA's charges of unlawful conduct (Affidavit of E. C. Thompson, pp. 2, 4-5). The NMB reviewed the complete records in both New York cases and the CAB case, as well as the results of its own field investigation (Affidavit of Weiss, p. 9; affidavit of E. C. Thomp-

son, p. 5; affidavit of O'Neill, pp. 2-5). The Board determined that FEIA's strike against Eastern was an economic strike and that Eastern, therefore, had a right to permanently replace the strikers (Affidavit of Weiss, p. 9; affidavit of O'Neill, pp. 4-5). Cf., *NLRB* v. *McKay Radio & Tel. Co.*, 304 U.S. 333 (upholding an employer's right to permanently replace economic strikers). Finally, the NMB determined that to the extent, if any, that FEIA's charges might have a bearing upon the conduct of the representation election, and except for raising an issue of voter eligibility, the charges 'were so lacking in merit as not to warrant a special hearing and that no interference with the employees' choice of representatives could be shown' (Affidavit of O'Neill, p. 3). The only significant question found by the NMB to have been raised by FEIA's charges, related to which persons were eligible to vote; and, accordingly, the NMB directed a hearing on this issue (Exhibit 1 to the affidavit of I. J. Gromfine).

Thus, if it be assumed that the appellant's charges might have had a bearing upon the conduct of the representation election by the NMB over and above the question of voter eligibility and should have been considered by the Board, still the appellant would have no legitimate complaint. The Board did receive the results of its field investigation as well as other evidence upon them, did consider them, and found them to be without merit. The only action which the NMB failed to take was to hold a hearing upon the general charges of unlawful conduct. However, it is well-settled that the NMB need not hold hearings in connection with certification proceedings and may satisfy its statutory duty 'to investigate' by other methods. *Switchmen's Union* v. *National Mediation Board, supra*, 320 U.S. at 304; *Air Line Stewards and Stewardesses Ass'n.* v. *National Mediation Board, supra*, 314 F. 2d at 911; *WES Chapter* v. *NMB, supra*, 314 F. 2d at 237; *Ruby* v. *American Airlines, Inc., supra*, 323 F. 2d at 255." (Brief, pp. 32-33).

On June 4, 1964, ALPA, which won the election, was certified by the Mediation Board as the collective bargain-

ing representative for Eastern's flight engineers. Thereafter, in *Lind and Brunsgaard* v. *National Mediation Board,* an unreported action in the District Court for the District of Columbia to nullify ALPA's Mediation Board certification, two FEIA members claimed that the Board utilized an improper form of ballot in the representation election (Dist. Col. No. 1236-64). On August 6, 1964, the District Court, after concluding that the individual plaintiffs were bound by FEIA's failure to raise issues concerning the form of the ballot during proceedings before the Mediation Board, entered summary judgment against the plaintiffs, and dismissed the complaint. (Oral opinion of Judge William B. Jones, transcript, pp. 67-68). The District of Columbia Court of Appeals affirmed that result (D.C. Cir. No. 18,864-1965).

3. *Proceedings before the Civil Aeronautics Board*

On September 10, 1962, FEIA filed a complaint with the Civil Aeronautics Board (CAB Docket 14009) alleging that Eastern had violated Section 401(k)(4) of the Federal Aviation Act, 49 U.S.C. § 1371(k)(4), which makes it a condition upon the holding of a certificate by an air carrier that it comply with the Railway Labor Act. FEIA sought relief including reinstatement of the strikers.

The dismissal of this complaint (CAB Order No. E-19923, August 19, 1963) was upheld by the Court of Appeals for the District of Columbia. *FEIA* v. *Civil Aeronautics Board,* 332 F.2d 317 (D.C. Cir. 1964).

On September 9, 1966, FEIA filed in CAB Docket 14009 a document entitled "Petition to Renew Complaint and Reinstitute Enforcement Proceedings" (1a-8a). That Petition stated:

> "EAL Chapter has submitted this Petition for, and on behalf of, the strikers for the sole purpose of gaining reinstatement for them." (17a).

The "strikers" referred to include petitioners. FEIA's petition covered essentially the same matters dealt with in all prior litigation and the complaint herein (1a-8a).

On January 10, 1967, the Director of the Civil Aeronautics Board's Bureau of Enforcement denied FEIA's petition (19a-31a), stating in part:

> "The sole issue presented by EAL Chapter is whether the Board should order Eastern to re-employ an unspecified number of flight engineers discharged by it during an economic strike. This issue was litigated before the National Mediation Board and before the courts and in each instance decided adversely to EAL Chapter." (29a).
>
> * * *
>
> "It would not serve the national interest, the purposes of the Act or the Railway Labor Act for the Board to consider reopening this controversy, especially in the face of the unanimous decisions of the courts and the Mediation Board adverse to the complainant." (30a).

FEIA's petition for review of the refusal to institute enforcement proceedings (32a) was denied in CAB Order E-24939, issued April 4, 1967 (36a).

D. The complaint in this action

The Court below found that the instant complaint stated the same cause of action as the New York complaint. Comparison of the complaint in this action with the complaint in *FEIA* v. *Eastern and ALPA*, *supra*, shows:

1. Paragraph 51 of the dismissed New York complaint states:

> "The unlawful discharges of the Flight Engineers by Eastern, and the unlawful refusal of Eastern to reinstate the Flight Engineers to their employment have caused plaintiff and the members represented

by it, damage in the amount of $11,500,000 for back wages and other fringe benefits."

Paragraph 78 of the instant complaint likewise alleges that the discharge and failure to reinstate petitioners has deprived each of them of at least $10,000 annually, and paragraph 84 of the complaint seeks general or compensatory damages for such conduct in the amount of $17,390,100 (P.A. 27, 29).

2. Paragraph 52 of the dismissed New York complaint alleged that Eastern violated the Railway Labor Act by provoking the strike, which thereby became an unfair labor practice strike from its inception. Paragraphs 57, 58 and 63 of the complaint herein allege that Eastern and ALPA provoked and forced petitioners to strike for the purpose of confiscating their jobs (P.A. 21-23).

3. Paragraph 54 of the dismissed New York complaint alleges that Eastern accorded super-seniority to the strike replacements and discriminated against the strikers in violation of the Railway Labor Act. Paragraphs 39, 56 and 77 of the instant complaint are to the same effect, and paragraph 56 specifically alleges that respondents' objective was to confer super-seniority upon the employees who replaced petitioners (P.A. 16, 21, 26-27).

4. Paragraph 55 of the dismissed New York complaint alleges that Eastern unlawfully discharged and refused to reinstate the strikers. Paragraphs 64 and 65 of the complaint herein contain similar allegations (P.A. 23-24).

5. Paragraph 56 of the dismissed New York complaint alleges a conspiracy between Eastern and ALPA to confer petitioners' jobs upon pilots. Paragraph 66 of the complaint in this action alleges the same conspiracy claim (P.A. 24).

6. Paragraph 58 of the dismissed New York complaint alleged that Eastern's conduct prolonged the strike and converted it into an unfair labor practice strike. The allegations in paragraph 66 of the complaint in this action are to the same effect (P.A. 24).

7. In the New York action, plaintiffs prayed that the Court:

> "(4) Issue a mandatory injunction against Eastern ordering and directing it to offer to the striking flight engineers reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers;"

Paragraph 81 and paragraph (d) of the prayer for relief of the complaint in this action seek the same relief (P.A. 28, 30-31).

E. The relationship between FEIA and petitioners

The Court below found that petitioners are, for *res judicata* purposes, privies of FEIA. In addition to other matters in the record, depositions of petitioners Acree, Severn and Crabtree in this action contain the following admissions:

1. All petitioners are FEIA members (97a). Acree held office in FEIA as Atlanta Base Chairman on three different occasions, including a term covering the period when the 1962 FEIA strike began (67a-68a).

2. Petitioner Acree picketed and supervised picketing activities on behalf of FEIA in each year during the period 1962-1965 (67a, 72a). As of August 5, 1965, the date of his deposition, he had picketed as recently as June 23, 1965 (67a). All of the petitioners have on one or more occasions

picketed on behalf of FEIA (72a). All 637 persons for whose benefit this action is brought have picketed on behalf of FEIA in this dispute (91a).

3. FEIA represented all 637 of the persons on whose behalf this action is brought, including the 6 named petitioners (69a, 89a).

4. Petitioners have regularly received FEIA newsletters, and have been made aware by FEIA of the status of the several proceedings brought by FEIA against Eastern and ALPA (69a-70a). Petitioners have been aware that it was an objective of FEIA in those proceedings to secure a judgment or order reinstating each individual petitioner to Eastern's employ (82a).

5. Petitioners, in deciding to postpone the commencement of this action, agreed among themselves to await the outcome of the several pending actions which had been brought by FEIA respecting this controversy (52a-59a).

Argument

I.

There is no reason for further review of the Court of Appeals decision based upon Res Judicata.

This action, commenced three years after the underlying events, represents petitioners' attempt to relitigate the same charges and reinstatement and damage claims which have previously been rejected in all prior litigation since 1962. It is indeed significant that petitioners, in initially deciding to postpone this action, agreed among themselves to await the outcome of pending FEIA litigation based upon the controversy (52a-59a) and then filed the instant complaint on July 21, 1965, just one week (P.A. 1) after the District

Court granted summary judgment for defendants in FEIA's New York action.

The Court below held that the instant complaint was barred by the principles of *res judicata*. The Court concluded that the two cases involved the same cause of action and the same parties or their privies. The Court also found that the 1966 Second Circuit decision in *FEIA* v. *Eastern and ALPA*, constituted a final judgment for *res judicata* purposes. As shown below, the Fifth Circuit's decision correctly applies well established principles of law and there is no reason for further review.

Same cause of action

The Court of Appeals, comparing the particular allegations of the New York complaint to that herein (Pet. App. A3-A4),* found that application of any of the established standards for deciding whether two complaints state the same cause of action required a conclusion that the causes of action in New York and herein were identical:

> "Thus the cause of action relied on in the Second Circuit litigation and the one here are identical. The remedy requested is also identical. True the identical words have not been used. The complaints were prepared by different lawyers. But essentially they are the same. What difference exists is in form, and we have long held that in determining *res judicata* it is the substance of the action that counts. 'What is important and determinative now as to the identity of causes of action, is not identity of form, but of grounds.' *Wilson Cypress Co.* v. *Atlantic Coast Line R. Co.*, 5 Cir., 109 F. 2d 623, 627, *cert. denied*, 310 U.S. 653 (1940).
>
> In deciding whether the substances of two actions are for *res judicata* purposes the same, various tests

* References designated "Pet. App." are to the Appendices of the instant Petition for a Writ of Certiorari.

> have been advanced: Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments? See 1B J. W. Moore, Federal Practice ¶ 0.410[1], pp. 1157-1158 (2d ed. 1965), and cases there cited. Under any of these tests the cause of action in suit here is identical with the cause of action alleged in the New York complaint. There may be some difference in the legal theory supporting the actions, but the substance, for *res judicata* purposes at least, is the same. See *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 5 Cir., 295 F. 2d 362 (1961)." (Pet. App. A4-A5).

Other decisions applying these same tests include *Ballard* v. *First National Bank of Birmingham*, 259 F. 2d 681 (5th Cir. 1958) and *Bennett* v. *Commissioner of Internal Revenue*, 113 F. 2d 837 (5th Cir. 1940).

The Court below also examined and rejected petitioners' contention that the instant complaint raises only individual claims, while the FEIA New York action was restricted to institutional claims of FEIA:

> "It may be true that the New York proceeding covered institutional claims by FEIA as a collective bargaining agent, but the Second Circuit treated it as also including, as it obviously did, individual claims for reinstatement of its members and back pay. Certainly those claims are the same claims being made here, and the alleged bases for those claims are identical with the bases alleged in the New York proceeding. Under the plain allegations of the two complaints, other than Chinese copies it would be difficult indeed to find causes of action and claims for relief more similar than those asserted in the New York action and those asserted here." (Pet. App. A6).

The Court's conclusion that individual claims for reinstatement and damages were presented to and determined by the Second Circuit is fully supported by the record. In

its brief to the Second Circuit, FEIA, with respect to damages, expressly stated in a footnote:

> "5. The Amended Complaint states claims both by EAL Chapter *qua* union and by EAL Chapter on behalf of the individual flight engineers. The District Court was in obvious error in not recognizing these latter claims where it stated, 'FEIA is seeing [sic] global damages for alleged wrong to it and not individual damages for such of its members who may have been wrongfully discharged.' (R. 175) The complaint itself indicates clearly to the contrary." (P.A. 380).

FEIA, after stating that it had previously been suing "to protect its interests *qua* union," (P.A. 381) argued concerning reinstatement:

> "The Amended Complaint, on the other hand, presents claims of quite a different character involving the allegations of wrongful discharge (R. 28), and the request for the reinstatement of 500 flight engineers to their former employment. (R. 33) These claims were never presented before, they have nothing to do with which union is entitled to represent flight engineers, and certainly these claims cannot be said to fall within the exclusive jurisdiction of the Mediation Board. Indeed, unless this court acts, EAL Chapter will have exhausted its efforts to gain reinstatement for the 500 flight engineers." (P.A. 381-382).

In search of some theory to differentiate the instant complaint from the New York action, petitioners have asserted that Eastern and ALPA engaged in conduct contrary to the principles of fair representation set forth in *Bh'd. of Railroad Trainmen* v. *Howard,* 343 U.S. 768 (1952), and that the decision of the Court below is in conflict with *Howard.* There is, however, no conflict of decisions.

Howard held that a union representing white brakemen could not agree with the carrier to displace negro "train porters," who did precisely the same work under a different job title and were in an artificially created separate negro craft solely because of their race. There, the complaint alleged and the Court found "that 'train porters' do all the work of brakemen. : . ."

This action is completely distinguishable from *Howard.* Here, in direct contrast, the complaint expressly alleges that pilots (ALPA's bargaining unit) and flight engineers (petitioners' FEIA unit) perform completely separate and distinct work and job duties, and are in separate distinct job classifications (P.A. 10).

This controlling distinction between petitioners' complaint and *Howard* was recognized by the Fourth Circuit in *Rumbaugh* v. *Winifrede Railroad Co.,* 331 F. 2d 530 (4th Cir. 1964), *cert. den.* 379 U.S. 929 (1964). There, plaintiff argued that the defendant union's duty of fair representation extended to him under the *Howard* case even if he was not employed within the craft bargaining unit represented by the union. The union maintained that Rumbaugh was a supervisor and therefore not within the unit. With respect to the application of *Howard* to this situation, Chief Judge Sobeloff stated:

> "We agree that the [Supreme] Court [in *Howard*] disregarded the *artificial classification* of train porters and brakemen in holding that the union violated its obligation of fair representation by entering into a racially discriminatory collective agreement. But this disregard was a facet of the patently illegal activity of the Brotherhood. *It was the Court's view that the bargaining agent's obligation extended to all who worked in the craft, regardless of job classification.* The Court did not hold that the duty of fair representation extends even to workers, such as supervisors, who are not regarded as 'employees' within the meaning of the Railway Labor Act." 331 F.2d at 534 (emphasis added).

It is also a matter of judicial record that, unlike the "train porters" in *Howard* who were disqualified by their race—which they could not change—petitioners elected to withdraw from Eastern's services in 1962 to engage in an economic strike, and that they subsequently rejected Eastern's written invitation to each of them to return to work. In fact, they were not "displaced" by Eastern; they were replaced because the positions they had vacated and refused to return to during June, July and August, 1962 had to be filled before Eastern could resume airline operations. This fact alone removes this case completely from the scope of the *Howard* doctrine.

Same parties or their privies.

The decision below also examined petitioners' argument that this suit is brought by individuals on behalf of the former Eastern flight engineers while prior litigation was by FEIA (but admittedly on behalf of this same class).

The close and continuing relationship between the petitioners herein and FEIA is apparent from the depositions of petitioners Acree, Severn and Crabtree (43a-113a). All petitioners are FEIA members (97a). FEIA represented all 637 persons on whose behalf this action has been brought, including each of the named petitioners (69a, 89a). And, petitioners have been aware of the status of the numerous proceedings on their behalf against ALPA and Eastern (69a-70a).

Under these circumstances, the Court below properly concluded that petitioners are privies of FEIA, stating in part:

> "In all the prior proceedings the plaintiff was FEIA, an unincorporated association, suing for itself and its members who lost their jobs at Eastern, whereas this is a class action with appellants, members of FEIA, suing individually and for the other members of FEIA who lost their jobs. Thus in effect we have two class actions and the members of the classes are identical." (Pet. App. A6).

This holding of the Court of Appeals is based upon well established law. In *Hansberry* v. *Lee*, 311 U.S. 32 (1940), this Court said:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties . . . or where the interest of the members of the class, some of whom are present as parties is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. . . ."

See also *Chicago R. I. & P. Ry. Co.* v. *Schendel*, 270 U.S. 611 (1926); *Kersh Lake District* v. *Johnson*, 309 U.S. 485 (1940); *Ma Chuck Moon* v. *Dulles*, 237 F.2d 241 (9th Cir. 1956), *cert. den.* 352 U.S. 1002 (1957).*

The Fifth Circuit's determination is also completely consistent with recent decisions of this Court overruling the concept that a labor organization does not have the capacity to sue for the benefit of its members or to protect their employment rights against action in violation of federal labor law. For example, compare *Smith* v. *Evening News Association*, 371 U.S. 195 (1962) and *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957) to *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955). See also *Seafarers Int'l. Union* v. *Board of Trustees of Galveston Wharves*, 351 F. 2d 183 (5th Cir. 1965). Even FEIA, in its Second Circuit brief, argued that it possessed the capacity to sue

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* In addition, there is already a decision in the prior litigation holding that FEIA was authorized to represent the interests of its members and that its representation was conclusive as to their interests. *Lind and Brunsgaard* v. *National Mediation Board, supra.*

for the benefit of its members, stating: "There is no question a union may sue to enforce the mandates of the Railway Labor Act even though the remedy may inure to the benefit of individual employees only." (P.A. 380).

Final judgment

The decision below, after analysis of the Second Circuit's opinion, concluded that the dismissal of the New York action for lack of subject matter jurisdiction constituted a final judgment for *res judicata* purposes. The Fifth Circuit's decision, based upon a prior decision of this Court, stated, in part:

> "It is sometimes asserted that a decision has *res judicata* effect only if it is on the merits. But this overstates the case, for as the Supreme Court has said, 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.' *American Surety Co.* v. *Baldwin,* 287 U.S. 156, 166 (1932). See also *Estevez* v. *Nebers,* 5 Cir., 219 F.2d 321 (1955)." (Pet. App. A9).

II.

It is settled law that the District Court lacks jurisdiction over the subject matter of this action.

The District Court dismissed the complaint herein on grounds of both *res judicata* and lack of subject matter jurisdiction (Pet. App. C; P.A. 416-421). The Fifth Circuit, finding the action barred by *res judicata,* did not reach the issue of lack of subject matter jurisdiction (Pet. App. A2).

The Fifth Circuit did, however, conclude that the instant complaint and New York action allege the same cause of action. The Second Circuit, affirming summary judgment for defendants, found that this cause of action was beyond the scope of federal Court jurisdiction, stating:

"The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies 'in the teeth of the board's certification' of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the Board's certification of that union. *Order of Railway Conductors of America* v. *Pennsylvania R.R.*, 323 U.S. 166, 172, 66 S. Ct. 222, 89 L. Ed. 154 (1944). As the complaint itself recognizes, Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants.

"The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never dare to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claim that the Railway Labor Act had been violated—a result which would clash with the evident congressional intent to have disputed questions of representation in an industry so charged with the public interest disposed of rapidly. See *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 256 (2nd Cir. 1963), *cert. denied*, 376 U.S. 913, 84 S. Ct. 658, 11 L. Ed. 2d 611 (1964)." 359 F. 2d at 307-308.

The clear lack of District Court jurisdiction over the subject matter of the instant complaint is still another reason why there is no cause for further review. *General Committee, etc.* v. *M-K-T Railway Co.*, 320 U.S. 323 (1943).

Conclusion

The controversy arising from petitioners 1962 strike against Eastern has been the subject of constant litigation since that time. Every aspect of the dispute has previously been examined in detail by federal Courts and administrative agencies.

The record shows that petitioners 1962 strike against Eastern was preceded by their rejection of the recommendations of every neutral body which studied the crew complement problem, including the 1958 Presidential Emergency Board on Eastern, the 1961 Presidential Feinsinger Commission and 1962 Presidential Emergency Board on Eastern. Only two days prior to the strike, on June 21, 1962, TWA flight engineers reached a crew complement agreement along lines recommended by such bodies and consistently urged by federal officials and Eastern. It is, moreover, a matter of judicial record that FEIA alone rejected the recommendation of President Kennedy that the 1962 dispute be arbitrated and that, on June 23, 1962, the first day of the strike, President Kennedy described it as "the height of irresponsibility on their [FEIA's] part." *FEIA* v. *Eastern, supra*, 208 F. Supp. at 186. The plain fact is that the findings in every prior decision on this matter completely controvert all of the material allegations of the instant complaint.

In the present situation, the Fifth Circuit, after examining all of the prerequisites for *res judicata*, and after hearing every conceivable argument in support of petitioners, concluded that they have had their day in court. The Court of Appeals decision correctly applies established principles of law. As shown above, there is no conflict of decisions. And, since the decision below is based upon settled law, this case does not involve issues which merit the attention of this Court.

It should also be noted that the petition for certiorari herein does not conform to Rule 23 of this Court.

Under these circumstances, and for the reasons previously stated, it is submitted that there is no reason for further review and that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Appendix

Section 2, Ninth of the Railway Labor Act, 45 U.S.C. §152, Ninth, provides:

> "Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."